

No. 284.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

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JAMES D. BYRNES, et al.

Appellants.

vs.

J. M. DOUGLASS, et al.

Appellees.

FILED

APR 3 - 1896

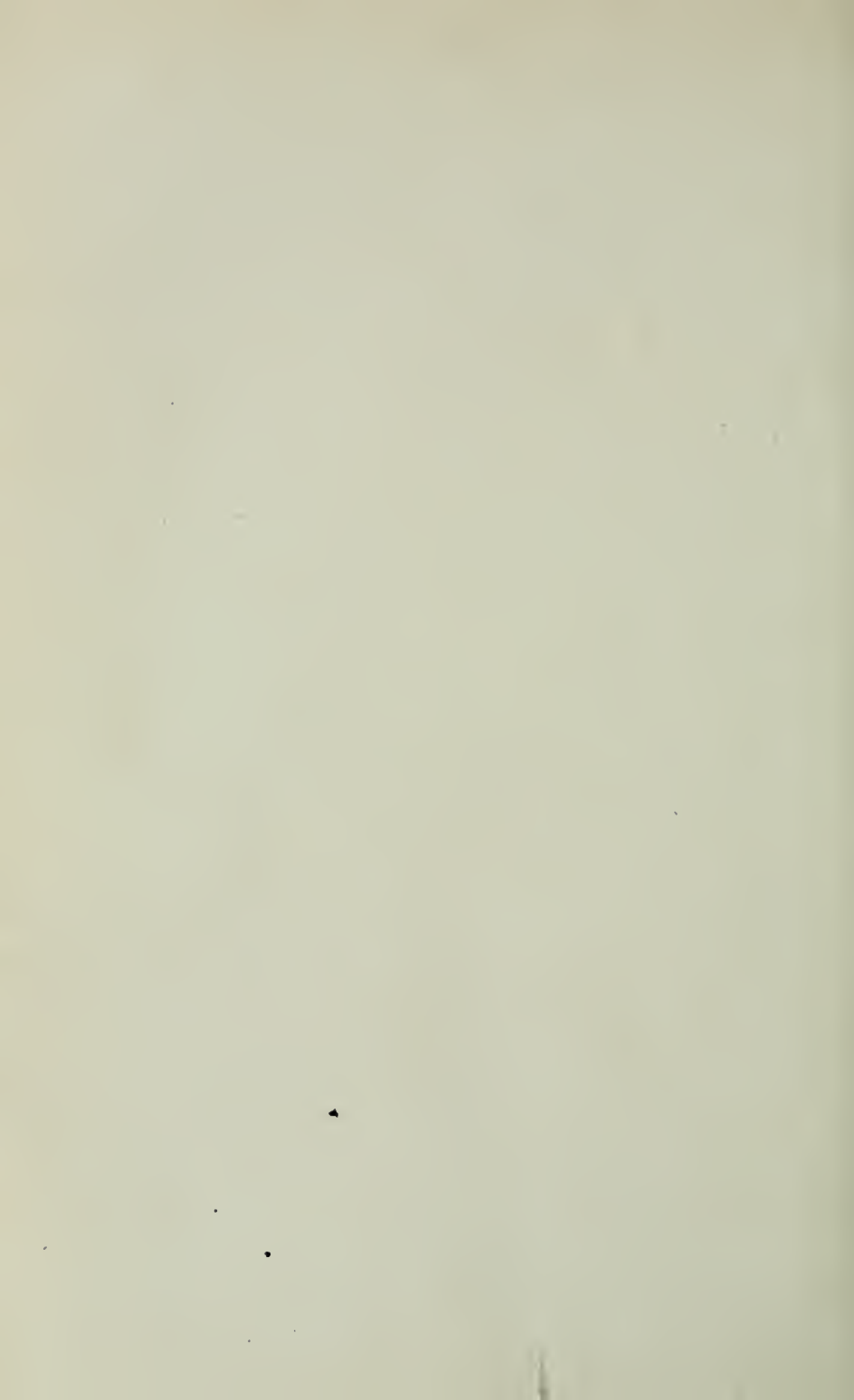
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TRANSCRIPT OF RECORD.

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Appeal from the Circuit Court of the United States,  
Ninth Circuit, District of Nevada.

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*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS and THE GOOD-  
MAN MINING COMPANY,

Plaintiffs,

vs.

JAMES D. BYRNES, EDWARD MUL-  
VILLE, H. C. BIGGS, MAGGIE LEE  
McMILLAN, THE RED JACKET  
CONSOLIDATED MINING COM-  
PANY, a Corporation, and THE  
SOUTH END MINING COMPANY,  
a Corporation,

Defendants.

### **Bill of Exceptions and Statement on Appeal.**

Be it remembered, that J. M. Douglass, one of said plain-  
tiffs, filed in said Circuit Court his Amended Complaint  
and Petition, which is in the words and figures following,  
to-wit:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS,

Plaintiff,

vs.

JAMES D. BYRNES, EDWARD MUL-  
VILLE, H. C. BIGGS, MAGGIE LEE  
McMILLAN, THE RED JACKET  
CONSOLIDATED MINING COM-  
PANY, a Corporation, and THE  
SOUTH END MINING COMPANY,  
a Corporation,

Defendants.

### **Amended Complaint and Petition.**

Now comes the above-named plaintiff, J. M. Douglass, and by leave of the Court, on consent of defendants, first had herein, files this, his amended petition, and says, that he is a citizen of the United States and is engaged in the business of mining for gold and silver ores in the Devil's Gate and Chinatown Mining District, Lyon county, State of Nevada. That in said district is a mining claim known and called the Goodman mine. That said mine is owned by the Goodman Gold and Silver Mining Company, a corporation, organized and existing under the laws of the State of Nevada, with a capital stock of six millions of dollars, divided into sixty thousand shares of the par value of one hundred dollars each. That your petitioner at the time of the commencement of this proceeding was and now is the owner and holder of a controlling interest

of the capital stock of said corporation, to-wit, of forty-seven thousand eight hundred and sixty-five shares of said sixty thousand shares of said capital stock, and that he is and has been for two years last past, engaged in mining in said Goodman mine, for his own benefit, in his own individual interest, at his sole individual expense and outlay, and with knowledge, acquiescence and consent of said corporation, the owner of said mine. That there is also in said mining district a mining claim located, known and called the Contact G. & S. Mining Claim, in which your petitioner is one-half owner. That lying between said Contact G. & S. mining claim and said Goodman mine are the following mining locations, to-wit: The Atlantic Consolidated mining claim, the Annie mining claim, the South End mining claim, the Red Jacket mining claim, and the Clinton mining claim. That the only direct, convenient and economical way for working and developing said Goodman mine and said Contact G. & S. mining claim is by means of a mining tunnel run and constructed from said Contact mine into said Goodman mine through said five intervening mining locations.

Your petitioner would further show that in the judgment of your petitioner the said Goodman mine and mining claim will, when prospected and developed, become and prove to be a valuable claim, out of which large quantities of valuable gold and silver bearing ores, rock and earth may be extracted; that said Contact mine is of easy access for all purposes connected with mining operations, while the said Goodman mine is situated upon an elevation of land about four hundred feet above said Contact mine, and that said Goodman mine cannot be worked, prospected or developed by any tunnel shaft or excava-

tion run, dug or made therein, except at great expense, and such an expense as will render mining thereon or therein impracticable, and that the only sure, economical and feasible method by which said Goodman mine can be worked and developed is by and through said tunnel and in connection with the working of said Contact mine. That to construct said tunnel it was necessary to pass through said intervening mining claims or parts thereof. That your petitioner endeavored to work and develop said Goodman mine by means of vertical shaft sunk thereon but after the expenditure of a large sum of money in sinking said shaft he was compelled to abandon said shaft as impracticable by reason of encountering water therein that could not be handled through and by means of said shaft. That it was absolutely necessary to construct said tunnel into said Goodman mine to drain said water therefrom and reach the ledge therein so as to mine the same, without which said Goodman mine will be worthless. That when said tunnel shall be completed it will be a permanent public use and benefit to all of said mining claims in said district.

That your petitioner has at his own cost and expense and for the purpose of enabling him to carry on his said business of mining in and developing said Goodman mine, amounting to more than six thousand dollars, already constructed said tunnel from said Contact mine through said Atlantic Consolidated mining claim, said Annie mining claim, a part of said Red Jacket mining claim, a part of said South End mining claim and through said Clinton mining claim, into said Goodman mine, and is still driving said tunnel to reach the ledge of said Goodman mine and drain the water therefrom.



That he has been so engaged in running said tunnel for the purpose of developing said mines as aforesaid and the discovery of any blind or unknown ledge or ledges on the line of said tunnel since the 16th day of September, 1891, with the knowledge and without any objection from owners or claimants of said mining claims until he had passed through them as aforesaid.

That said tunnel from its mouth on said Contact mine to its present face in said Goodman mine is of the dimensions, to-wit, seven and one-half feet wide by seven and one-half feet high, the same being necessary and proper dimensions for same, and with which said tunnel passes through two hundred sixty-five and six-tenths (265 6-10) feet of said Atlantic Consolidated mining claim, and one hundred seventy-one and seven-tenths (171 7-10) feet of said Annie mine, ninety and eight-tenths (90 8-10) feet of said Red Jacket mine, fifty-six and three-tenths (56 3-10) feet of said South End mine, and one hundred and forty-five (145) feet of said Clinton mine, to the line of said Goodman mine. That your petitioner desires to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel so constructed from said Contact mine into said Goodman mine, particularly described as follows, to-wit: Beginning at a point on said Contact mine on the south side of American Ravine whence bears the southwest corner post of the Comet North Extension mining claim, which is U. S. survey No. 150, south three degrees and forty-three minutes west, distance two hundred and seventy-five feet and running first course south sixty-eight degrees and fifteen minutes west three hundred sixty and three-tenths feet; thence second course

south forty-six degrees and fifteen minutes west sixty-one and one-tenth feet; thence third course south sixty-three degrees and eighteen minutes west thirty-four and two-tenths feet; thence fourth course south fifty-three degrees and forty-five minutes west eighty-eight feet; thence fifth course fifty-four degrees and eleven minutes west thirty-three and six-tenths feet; thence sixth course south seventy-nine degrees and forty-seven minutes west forty-one and three-tenths feet; thence seventh course south forty-three degrees and six minutes west forty-nine and nine-tenths feet; thence eighth course south sixty-one degrees and fifty-one minutes west seventeen and five-tenths feet; thence ninth course south seventy-six degrees and eight minutes west thirty-three feet; thence tenth course south sixty-eight degrees and thirty-three minutes west three hundred and forty-seven feet to the line of the said Goodman mine magnetic variation sixteen degrees, thirty minutes east. That he desires to appropriate on said course, seven and one-half feet wide by seven and one-half feet high, two hundred sixty-five and six-tenths feet of said Atlantic Consolidated mining claim, one hundred and seventy-one and seven-tenths feet of said Annie mining claim, ninety and eight-tenths feet of said Red Jacket mining claim, fifty-six and three-tenths feet of said South End mining claim, and one hundred and forty-five feet of said Clinton mining claim to the said Goodman mine.

That there exists a necessity for the said number of feet with the said height and width through said mining claims being appropriated to your petitioner, to enable him to carry on his said mining business in working and developing said Goodman mine, as by no other means can be conveniently and economically reached the mineral bearing

ledge in said Goodman mine and drain said mine of the water therein and that said tunnel when completed will be of great use and benefit in working expeditiously, conveniently and economically all the mining claims on the line thereof as aforesaid.

That so far as your petitioner can ascertain the said defendants James D. Byrnes and Edward Mulville claim to be the owners of, or to have some interest in said Atlantic Consolidated mine. That said defendants, H. C. Biggs and Maggie Lee McMillan claim to be the owners of, or to have some interest in said Annie and Clinton mines; that said defendant, Red Jacket Consolidated Mining Company claims to be the owner of said Red Jacket mine, and said defendant, South End Mining Company claims to be the owner of said South End mine, and these are all the parties, so far as your petitioner can learn or ascertain, who claim any interest in said five mining locations, or any of them, but what interest or if any said parties or any thereof have, or has in any of said claims, your petitioner does not know and does not admit any. Your petitioner further shows that he is now in possession of said tunnel through all of said mining claims by an order of a judge of the District Court of the State of Nevada, Lyon county, and he is desirous of remaining in the possession thereof as by said order provided and upon the security given to secure the compensation for said parts of said mining claims when such compensation shall have been ascertained.

Your petitioner further shows that he located a tunnel right as above described as by the laws of congress provided. Your petitioner further shows that from the mouth of said tunnel on said Contact mine to the line of said Atlantic Consolidated mine the distance is two hun-

dred and ninety-nine feet, from which on said course of said tunnel to said Goodman mine the aforesaid five mining claims lie successively touching, making the number hereby sought to be condemned and appropriated between the said Contact and Goodman mines eight hundred eleven and seven-tenths feet, seven and one-half feet high by seven and one-half feet wide apportioned among five said mining claims as aforesaid. That no damage can possibly result to any of said mines by the construction of said tunnel through them or any of them but as your petitioner verily believes said tunnel will be a benefit to all of said mines. That said tunnel was by your petitioner located Feb'y 6th, 1893, and recorded by the name Contact-Goodman tunnel.

Wherefore, petitioner prays that this court or the judge thereof appoint three competent and disinterested persons as commissioners under the act of the legislature of the State of Nevada entitled, "An Act to encourage the mining, milling, smelting, or other reduction of ores in the State of Nevada," approved March 1st, 1875. That the parts of said mining claims, hereinbefore set out, be appropriated to the use and benefit of your petitioner, and that said commissioners be directed to convey the same to your petitioner; that the defendants herein and all other persons known or unknown, who claim any interest in said claims be required to assert the same, and for all general relief.

F. M. HUFFAKER, and  
BAKER, WINES & DORSEY,  
Attorneys for Petitioner.

State of Nevada, }  
County of Storey. } ss.

J. M. Douglass, being first duly sworn says he is the petitioner named in the foregoing proceedings, that he has heard read the foregoing amended petition and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

J. M. DOUGLASS.

Subscribed and sworn to before me this 8th day of September, 1893.

[Seal]

F. M. HUFFAKER,  
Notary Public, Storey County, Nevada.

[A Copy.]

I hereby certify the foregoing to be a full, true and correct copy of the original hereof.

Witness my hand this 8th day of Sept. 1893,

F. M. HUFFAKER,  
Attorney for Petitioner.

---

Afterwards the defendants in said action and proceeding filed their Answer to said amended petition, which is in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit, District of Nevada.*

J. M. DOUGLASS,

Plaintiff.

vs.

JAMES D. BYRNES, EDWARD MULVILLE, H. C. BIGGS, ANDREW CHARLES, GEO. W. DEBUS, MAGGIE LEE McMILLAN, THE RED JACKET GOLD AND SILVER MINING COMPANY, a Corporation, and THE SOUTH END MINING COMPANY, a Corporation.

Defendants.

### Answer.

And now come James D. Byrnes, Edward Mulville, H. C. Biggs, Geo. W. Debus, Maggie Lee McMillan, The Red Jacket Gold and Silver Mining Company, a corporation, and The South End Mining Company, a corporation, defendants named in the above-entitled action and for their joint and several answer to the complaint of plaintiff on file in the above-entitled action, and for answer to order to show cause issued therein, admit that J. M. Douglass, the plaintiff named in the said action, is a citizen of the United States. They allege that they are informed and believe that said plaintiff is not the owner of said Goodman mine. They are informed and believe that said plaintiff is not the owner of the Contact mine mentioned in said complaint,



except as trustee for James D. Byrnes and Edward Mulville, and upon such information and belief they deny that said plaintiff is the owner of said Contact mine, except as such trustee. They admit that said plaintiff is an owner, as tenant in common with Maggie Lee McMillan and H. C. Biggs, of the Contact G. & S. mining claim. They admit that the Atlantic Consolidated mining claim, the Annie mining claim, the South End mining claim, the Red Jacket mining claim, and the Clinton mining claim, mentioned in said complaint, are between said Contact G. & S. mining claim and said Goodman claim, and they allege that said Contact G. & S. mining claim lies in front of and lower down the hill and below each and all of said mining claims above and in said complaint mentioned. They admit that the most convenient and economical way of working and developing the Goodman and Contact claim is by means of a tunnel from said Contact mine into said Goodman mine. Defendants deny that when the tunnel mentioned in said complaint shall have been completed it will be a public use or benefit to all or any of the mining locations in the district where said claims are situated except said Goodman mine; but on the contrary, the defendants allege that said tunnel will be solely for the private use and benefit of said plaintiff if run by plaintiff and said Goodman mine and the owners thereof.

Defendants deny that said plaintiff has at his own cost or expense already constructed said tunnel from said Contact mine through said Atlantic Consolidated mining claim, Annie mining claim, a part of Red Jacket mining claim, and South End mining claim and into said Clinton mining claim and near the line of said Goodman mine; but on the contrary defendants allege that

when said plaintiff took possession of said tunnel, as hereinafter mentioned, said tunnel had already been constructed by said Atlantic Consolidated Mining Company a distance of about four hundred feet from the mouth thereof through said Contact mining claim and into the Atlantic Consolidated mine, and that said plaintiff simply repaired the portion then run and continued said tunnel to a point near the line of said Goodman mine through the mines west of said Atlantic Consolidated mine. Defendants deny that since the 16th day of September, 1891, said plaintiff has been engaged in running said tunnel without any objections from the owners of said mining claims; but on the contrary said tunnel was run against the objections of defendants since the 4th day of January, 1893. Defendants deny that there exists the necessity of the number of feet with the height and width through said mining claims mentioned in said complaint upon the line and course described in said complaint being appropriated to said plaintiff to enable him to develop said Goodman mine, or to successfully carry on his business of mining in said district; but on the contrary defendants allege that said plaintiff can run a tunnel of his own at any other point from said Contact mine to said Goodman mine upon some other course than that described in said complaint, in and upon land not occupied by the tunnel described in said complaint. Defendants deny that said tunnel, when completed by plaintiff, will be of equal use or benefit to all or any of these defendants in developing expeditiously, conveniently or economically each or any of said five intervening mining claims; but on the contrary, said tunnel is and has been since the fourth day of January, 1893, run by



plaintiff for himself and claimed by him as his own property for his own use and benefit. Defendants deny that defendants, H. C. Biggs, Andrew Charles and Maggie Lee McMillan, or either of them, have by force or by arms, except as hereinafter stated, taken possession of said tunnel, or have balkheaded the same, or refused to permit plaintiff to proceed with the construction of said tunnel and they deny that said defendants or any of them have since the 5th day of June, 1903, excluded plaintiff from the possession of said tunnel or refused to permit plaintiff to proceed with the construction of said tunnel, but on the contrary defendants allege that said plaintiff is in the possession of said tunnel under an order of court issued in this action. Defendants deny that their permitting plaintiff to construct said tunnel would not interfere in any wise with said defendants' possession or working said Annie mine, or would not deprive them of any property; but on the contrary defendants allege plaintiff did prevent said owners of said Annie mine and the owners of all other of said mines from working or entering their mines through said tunnel, until said defendants, H. C. Biggs and Maggie Lee McMillan, took possession of the same as hereinafter described.

Defendants admit that defendants, James D. Byrnes and Edward Mulville, are the owners of the Atlantic Consolidated mine; that said defendants, H. C. Biggs and Maggie Lee McMillan, are the owners of the Annie and Clousa mines, but they deny that Andrew Charles and George H. Debus are, or either of them is, the owner of either of said mines, or of any property or land upon the course of said tunnel described in the complaint in this action. They admit that The Red Jacket Consolidated

Mining Company, a corporation organized and existing under the laws of the State of California, is the owner of the Red Jacket mine, and defendant, South End Mining Company, is the owner of said South End mine, and they admit that these defendants are all the parties having any interest in said five mining locations. Defendants deny that said plaintiff is not in the possession of said tunnel, but they admit that he was not in the possession of said tunnel when this action was commenced. Defendants deny that plaintiff located any tunnel right as described in said complaint as by law of congress required, or except as hereinafter stated.

Defendants deny that no injury can possibly result to any of said mines by the construction of said tunnel, or that said tunnel was by said plaintiff located on February 6th, 1873, except as hereinafter stated.

And for a further answer and defense to this action, and to show cause why the prayer of said petitioner's complaint should not be granted and why three commissioners should not be appointed as prayed for by plaintiff, and why said five claims or any of them should not be appropriated to the use or benefit of said J. M. Douglass as a right of way for said tunnel or for any other purpose, these defendants allege and show to the Court that said defendants, James D. Byrnes and Edward Mulville, are now and ever since the 19th day of March, 1892, have been the owners in fee simple and entitled to the possession of those certain premises and mining claim known as and called the Atlantic Consolidated Mining Company's claim and premises, situate, lying and being in the Devil's Gate and Chinatown Mining District, Lyon county, State of

Nevada, described as follows, to-wit: That certain mining claim or premises being mineral entry No. 152, in the series of the office of the register of the land office at Carson City, in the State of Nevada, designated by the surveyor general as lot No. 111 embracing the portion of section eight (8) in township sixteen (16) north, of range twenty-one (21) east, Mount Diablo meridian, in the Devil's Gate and Chinatown Mining District in the counties of Lyon and Storey and State of Nevada, in the district of lands subject to sale at Carson City, containing eight (8) acres and twenty-six hundredths (26/100) of an acre of land, more or less, according to the returns on file in the general land office, bounded, described and platted as follows, with magnetic variations of sixteen (16) degrees, thirty (30) minutes east, to-wit: Beginning at a post marked No. 1, U. S. survey No. 111, from which the southwest corner of section eight (8) in township sixteen (16) north, range twenty-one (21) east, Mount Diablo meridian, bears south forty-one (41) degrees fifteen (15) minutes west, at the distance of thirty-one hundred and seventy-two (3172) feet; thence from said post south eighty-two (82) degrees east two hundred (200) feet to a post marked No. 2, U. S. survey No. 111; thence south eight (8) degrees west eighteen hundred (1800) feet to a post marked No. 3, U. S. S. No. 111; thence north eighty-two (82) degrees west two hundred (200) feet to post marked No. 4 U. S. survey No. 111; thence north eight (8) degrees east eighteen hundred (1800) feet to the place of beginning, containing eight (8) acres and twenty-six hundredths (26/100) of an acre of land more or less, embracing eighteen hundred (1800) linear feet of said Pacific lode, to-wit: Six hundred (600) linear feet north-

erly and twelve hundred (1200) linear feet southerly from discovery stake on said lode, as represented by yellow shading in the plat on page 141, Book "B" records of survey, in office of the county recorder of Lyon county, Nevada; together with all the dips, spurs and angles and also all the metals, ores, gold and silver bearing quartz rock and earth therein; and all the rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also, all and singular the tenements, hereditaments and appurtenances thereto belonging or in anywise appertaining and the rents, issues and profits thereof. That said defendants, James D. Byrnes and Edward Mulville are now and ever since the 1st day of January, 1890, have been by themselves and their predecessors in interest and grantors and their tenants, so the owners seized in fee of the said mining claims and premises, together with the appurtenances and until the wrongful acts of the plaintiff hereinafter mentioned, were in the peaceable, quiet and lawful possession of the said premises and mining claim and the whole thereof, together with the appurtenances.

That prior to the 22d day of March, 1890, the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville, constructed a mining tunnel known as and called the Atlantic Consolidated tunnel, commencing upon public mineral land of the United States, adjoining and contiguous to said Atlantic Consolidated mining claim above described, which public mineral land of the United States was then and there in the lawful, peaceable and quiet possession of the predecessors in interest and grantors of said defendants, James D. Byrnes and Edward Mulville, and continued the con-



struction thereof through the said public mineral land of the United States, and into and upon the premises hereinbefore described, the said Atlantic Consolidated mining claim, for the purpose of prospecting, exploring and working said mining claim and premises. That defendants' predecessors in interest and grantors did by means of said tunnel prospect said mining claim and premises, and that said tunnel with the right of way through said adjoining mineral land of the United States and the right to work, prospect and develop said Atlantic Consolidated mining claim by means of said tunnel, are appurtenant to and belong and are a part of the said Atlantic Consolidated mining claim and premises hereinbefore described. That the tunnel described in the complaint in this action is the same tunnel described in this answer, and that said tunnel was actually constructed by the Atlantic Consolidated Mining Company, and the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville, a distance of about four hundred feet from its mouth, long before said plaintiff entered into the possession thereof under a lease as hereinafter set forth and described. That said tunnel was run and constructed by the Atlantic Consolidated Company, the predecessor in interest and grantor of defendants, James D. Byrnes and Edward Mulville, as hereinafter described, and said company last mentioned on the 22d day of March, 1890, leased and demised said tunnel by a lease, a copy of which is hereto annexed and made part of this answer, to one W. H. Stanley, and said W. H. Stanley afterwards, and on or about the 22d day of March, 1890, entered into possession of said described premises including said tunnel, under said lease, and remained in the possession thereof until

the 16th day of September, 1891, when one Frank A. Muhlbe-  
yey, in his own name but for the sole use and benefit of  
the plaintiff in this action, bought said lease from said  
W. H. Stanley, and said Frank A. Muhlbe-  
yey afterwards and on the date last aforesaid sold, transferred and as-  
signed said lease to Joseph M. Douglass, the plaintiff in  
this action, who entered into the possession of said At-  
lantic Consolidated mining claim and said tunnel under  
said lease, and who under said lease worked said mine  
and took out ore therefrom and had it crushed. That said  
J. M. Douglass claims title to the said Contact mine so  
called, mentioned in said complaint under and by virtue  
of a conveyance made to him by said Frank A. Muhlbe-  
yey. That said W. H. Stanley was in possession of said Atlantic  
Consolidated mine and said tunnel under said lease as  
said plaintiff, Joseph M. Douglass well knew, and while he  
was a tenant of said Atlantic Consolidated Mining Com-  
pany, as said plaintiff well knew, said W. H. Stanley, in  
order to secure and peaceably hold said mine and work  
the same through said tunnel under said lease, purchased  
said Contact mine from one C. E. Brown by a good and  
sufficient conveyance made and delivered by said Brown  
to said W. H. Stanley on the 13th day of June, 1891, and at  
the time when he assigned said lease he (said Stanley)  
conveyed said Contact mine on the 16th day of September,  
1893, to said Frank A. Muhlbe-  
yey, all of which said plain-  
tiff well knew. That afterwards, and on the 16th day of  
September, 1891, said Frank A. Muhlbe-  
yey assigned,  
transferred and set over to said plaintiff said lease, and at  
the same time conveyed to said plaintiff the interest in the  
said Contact claim which said Stanley had conveyed to  
him as aforesaid, and said plaintiff took possession of

said Atlantic Consolidated mine and said tunnel and said Contact mine under said lease and held possession thereof and worked said Atlantic Consolidated mine as tenant of said Atlantic Consolidated mine, and that by virtue thereof and by reason of said purchase of said Contact mine said Joseph M. Douglass holds the title to said Contact mine in trust for defendants, James D. Byrnes and Edward Mulville. That at the time when said plaintiff received said lease said South End Mining Company was the owner and in the possession of the South End mining claim described in said complaint, and ever since has been the owner and in the possession thereof, and said Red Jacket Consolidated Mining Company was then and ever since has been the owner of said Red Jacket mining claim described in said complaint. That at the time when said plaintiff received said lease, the Annie claim and Clinton claim were vacant and unoccupied mineral land of the United States, and afterwards and prior to the commencement of this action the predecessors in interest and grantors of said defendants, H. C. Biggs, Maggie Lee McMillan, being then and there citizens of the United States, having discovered within the boundaries of each of said Annie and Clinton claims a ledge of gold and silver-bearing quartz rock in place, located each of said claims last mentioned, in accordance with the laws of the United States and of the State of Nevada, and in accordance with the local rules, laws and customs of the miners of the district where said claims are situated, and said locators afterwards and prior to the commencement of this action by good and sufficient conveyances conveyed said claims to said H. C. Biggs and Maggie Lee McMillan, and said H. C. Biggs and Annie Lee McMillan have ever

since owned the said claims and have ever since complied with all of said laws, rules and customs and are entitled to hold, possess and work the same through and by means of said tunnel described in said complaint and in this answer. That on the 6th day of February, 1893, said plaintiff made a pretended location of the tunnel right described in said complaint, a copy of the notice of location of which is hereunto annexed marked "Exhibit B." That at the time said location was made all the land described within the boundary lines of the said tunnel right had been before that time located, held, owned and possessed by the plaintiff and by the defendants in this action and by the Goodman Mining Company, and by their grantors and predecessors in the mining claims under the act of congress and by the Goodman Mining Company. That the Goodman mine was then and long prior thereto, and ever since has been owned and possessed by the Goodman Mining Company, a corporation organized and existing under and by virtue of the laws of the State of California. The Red Jacket mining claim was owned and possessed by The Red Jacket Consolidated Mining Company, a California corporation; the South End mining claim was owned and possessed by The South End Mining Company, defendant; the Annie and Clinton mining claims by the predecessors in interest and grantors of H. C. Biggs and Maggie Lee McMillan, and the Contact mining claim by the plaintiff as trustee in equity for the defendants, James D. Byrnes and James J. Greene, and by the predecessors in interest and grantors of H. C. Biggs and Maggie Lee McMillan. That said James J. Greene conveyed his interest in said Atlantic Consolidated mining claim and said tunnel to Edward Mulville, defendant, February



25th, 1893. That no ledge or vein, or other deposits of ore within the boundary lines of said tunnel claim was vacant or unoccupied at the time of plaintiff's location, and no land within the boundaries of said tunnel claim was vacant or unoccupied at said time, and no ledge, vein or lode was penetrated or discovered by running said tunnel that was not either known to exist at the time of said location, or that was not owned and possessed by the defendants in this action or by some of them, or by their predecessors in interest and grantors, and that the location by plaintiff of said tunnel right was absolutely null and void, and that plaintiff has not by means of said tunnel discovered or found any lode, vein or ledge that was not owned and possessed at the time by the defendants or some of them or by their predecessors in interest or grantors prior to said location.

Defendants allege that all the veins, lodes or ledges within the boundary lines of said tunnel right location are within the boundary lines of the claims mentioned in said complaint and in this answer, and all of them except said Goodman claim and except said Contact claim were owned and possessed by defendants or their grantors long before the location of plaintiff's tunnel right, and that plaintiff is seeking to condemn in these proceedings a tunnel already constructed through and upon mining claims owned by defendants and not for the purpose of discovering or locating any lode, vein or ledge.

That heretofore, to-wit, on or about the 4th day of January, 1893, and while the defendants, James D. Byrnes and Edward Mulville, were so the owners and so seized in fee simple of said Atlantic Consolidated mining claim and premises and said tunnel and right of way, and while

the predecessors in interest and grantors of said defendants, James D. Byrnes and Edward Mulville, were in the quiet and peaceable possession of said mining claim and premises and said tunnel and right of way, the said plaintiff by himself and his agents and employees entered into and upon said tunnel and into and upon the mining claim and premises hereinbefore described beneath the surface of the same and where the same is penetrated by said tunnel and ousted and ejected said defendants, James D. Byrnes and James J. Greene therefrom, and from thence hitherto until May 20th, 1893, said plaintiff wrongfully and unlawfully withheld the possession thereof from defendants, Byrnes and Mulville, and their predecessors in interest and grantors. That said defendants, Biggs and McMillan, on or about the 20th day of May, 1893, took possession of said tunnel by the permission of the owners thereof, for the purpose of carrying on the business of mining through said tunnel and for the purpose of prospecting and working said Annie and Clinton mines, and said defendants, Biggs and McMillan, at the time of taking possession of said tunnel were the owners of an undivided interest of one-half of said Contact mining claim, and entered upon their own property for the purpose of working their said claims through said tunnel and through the said Atlantic Consolidated claim by permission of the owners thereof.

Wherefore, the defendants having fully answered and shown cause therefor, pray that this action be dismissed with judgment for costs against plaintiff.

W. E. F. DEAL,  
Attorney for Defendants.

**Exhibit "A" to Answer.**

This indenture, made the twenty-second day of March, in the year of our Lord one thousand eight hundred and ninety, between the Atlantic Consolidated Mining Company, a corporation organized and existing under the laws of the State of California, the party of the first part, and W. H. Stanley, of Virginia City, Storey county, State of Nevada, the party of the second part witnesseth: That the said party of the first part does by these presents release and demise unto the said party of the second part its mining property known as the Atlantic Consolidated mine, situated in the American Ravine one mile west of Silver City, in the Devil's Gate and Chinatown Mining District, counties of Lyon and Storey, State of Nevada, with the appurtenances for the term of two years from the 22d day of March, 1890, with the privilege of an extension of said lease for a further period of two years, at the rental of fifty cents per ton for each and every ton of ore extracted and milled from the said property, during the time of said lease, or the further extension of the same. It is hereby agreed that if any rent shall be due and unpaid, or if default shall be made in any of the covenants herein contained, that it shall be lawful for the said party of the first part to re-enter the said premises and remove all persons therefrom, and the said party of the second part does hereby covenant, promise and agree to pay the said party of the first part the said rent in the manner hereinbefore specified and not to let or underlet the whole or any part of said premises without the written consent of the party of the first part, and that at the expiration of said term or the extension as aforesaid, the said party of the second

part will quit and surrender the said premises in as good state and condition as reasonable use and wear thereof will permit. It is further agreed by the parties hereto that at any time during this lease or the extension as aforesaid, the said party of the second part shall have the right and privilege of purchasing from the said party of the first part seventy-five thousand shares of its capital stock, for the sum of twenty-five thousand dollars, which the said party of the first part hereby agrees to deliver to the said party of the second part upon the payment of the said sum as aforesaid.

In Witness Whereof, the said parties to these presents have hereunto set their hands and seals, in duplicate, the day and year first above written, the party of the first part being authorized thereto by a resolution of its board of directors passed at a meeting held March 22d, 1890.

THE ATLANTIC CONSOLIDATED M'G CO.

By James G. Greene, President, [Seal]

By D. M. Kent, Secretary, [Seal]

W. H. Stanley, [Seal]

State of California, }  
 City and County of San Francisco. } ss.

On this twenty-second day of March, in the year one thousand eight hundred and ninety, before me, Charles D. Wheat, a notary public in and for said city and county of San Francisco, residing therein, duly commissioned and sworn, personally appeared James J. Greene, known to me to be the president, and D. M. Kent, known to me to be the secretary of the corporation described in, and that executed the within annexed instrument and they sev-

erally duly acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said city and county of San Francisco, the day and year in this certificate first above written.

[Seal]

CHAS. D. WHEAT,  
Notary Public.

State of California,  
City and County of San Francisco. } ss.

On the twenty-second day of March, A. D. one thousand eight hundred and ninety, before me, Chas. D. Wheat, a notary public in and for the city and county of San Francisco, State of California, residing therein, duly commissioned and qualified, personally appeared W. H. Stanley, known to me to be the person described in, whose name is subscribed to, and who executed the annexed instrument, and he duly acknowledged to me that he executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal at my office in said city and county of San Francisco, the day and year last above written.

[Seal]

CHAS. D. WHEAT,  
Notary Public.

**Exhibit "B" to Answer.**

Notice is hereby given by the undersigned citizen of the United States, that in pursuance to the acts of congress, section 2323, Revised Statutes, he claims a tunnel right running from the Contact mining claim to the Goodman patented mining claim, situated in the Devil's Gate and



Chinatown Mining District, Lyon county, State of Nevada, said being seven and a half feet wide by seven and a half feet high and particularly described as follows, to-wit: Called the Contact-Goodman tunnel. Beginning at a point on the Contact mining claim on the south side of American Ravine, whence bears the S. W. corner post of the Comet north extension mining claim, which is United States mineral survey No. 150, S. 3 deg. 43 min. W. distance of 270 feet and running first course S. 68 deg. 15 min. W. 360.3 feet, then second course S. 46 deg. 15 min. W. 61.1 feet, thence third course S. 63 deg. 18 min. W. 34.2 feet, thence fourth course S. 53 deg. 45 min. W. 88 feet, thence fifth course S. 74 deg. 11 min. W. 33.6 feet, thence sixth course S. 79 deg. 47 min. W. 41.3 feet, thence seventh course S. 43 deg. 06 min. W. 49.9 feet, thence eighth course S. 61 deg. 51 min. W. 17.5 feet, thence ninth course S. 76 deg. 68 min. W. 33 feet, thence tenth course 68 deg. 33 min. W. 347 feet to the Goodman mining claim, patented, (magnetic variation 16 deg. 30 min. E.) the objective point of said tunnel; that the undersigned is an owner in said Contact mining claim, where said tunnel commences, and of the Goodman mining claim, for the development of which said tunnel is being run and all rights provided by said act of congress are hereby claimed. This tunnel is being run for the said purpose of developing the said Goodman mining claim as well as the Contact ledge and not to interfere with the rights of any others.

J. M. DOUGLASS,  
Owner and Locator.

State of Nevada, }  
County of Storey. } ss.

J. M. Douglass, being duly sworn says he is the owner and claimant of the above-described tunnel, that said tunnel has been run by his predecessors and himself a distance of 718.1 feet from its face at a cost of \$3655, and more which were expended thereon and that it is his bona fide intention to prosecute work on the tunnel so located and above described with reasonable diligence for the development of the ledge in the Goodman mine and for the discovery of mines along its said described line and marked from this notice posted on a stake at the face of the above-described tunnel.

J. M. DOUGLASS.

Subscribed and sworn to before me this 6th day of February, 1893.

[Notarial Seal]

F. M. HUFFAKER,

Notary Public, Storey County, Nevada.

Recorded at the request of W. J. Douglass, Feb'y 6, 1893, at 25 minutes past two o'clock P. M. Thos. P. Mack, County Recorder.

State of Nevada, }  
County of Lyon. } ss.

I, Thos. P. Mack, County Recorder of Lyon county in the State of Nevada, duly elected, qualified and acting and being by virtue of said office the legal custodian of the records of said Lyon county, do hereby certify that the annexed and foregoing is a full, true and correct copy of that certain location of tunnel right claimed by J. M.

Douglass, Feb'y 6th, 1893, as appears of record in book "A" page 22 of mining locations and ass't work, records of said Lyon county, State of Nevada.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal at my office in Dayton, in county and State aforesaid, this second day of May, A. D. one thousand eight hundred and ninety-three.

THOS. P. MACK,

County Recorder of Lyon County, State of Nevada.

[Endorsed]: Certified copy of Location Notice of Contact-Goodman Tunnel.

[Endorsed]: In the Circuit Court of the United States, Ninth Circuit, District of Nevada. J. M. Douglass, Plaintiff, v. James D. Byrnes, et al, Defendants. Answer. Filed July —, 1893. W. E. F. Deal, Attorney for Defendants.

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To which answer, plaintiffs filed the following replication, to-wit:



*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS,	}
Plaintiff,	
vs.	
JAMES D. BYRNES, EDWARD MUL-	}
VILLE, H. C. BIGGS, MAGGIE LEE	
McMILLAN, THE RED JACKET	
CONSOLIDATED MINING COM-	
PANY, a Corporation, and THE	
SOUTH END MINING COMPANY,	
a Corporation,	
Defendants.	

### Replication.

This repliant, J. M. Douglass, saving and reserving to himself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties and insufficiencies of the answer of the said defendants for replication thereunto, saith that he doth and will aver, maintain and prove his said amended petition to be true, certain and sufficient in law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied is true, all which matters and things this repliant is ready

to aver, maintain and prove as this Honorable Court shall direct and humbly prays as in and by his said amended petition he hath already prayed.

F. M. HUFFAKER, and  
BAKER, WINES & DORSEY,  
Attorneys for Petitioner.

[Endorsed]: In the Circuit Court of the United States, Ninth Circuit, District of Nevada. J. M. Douglass, Plaintiff, v. James D. Byrnes, et al., Defendants. Replication. Filed this — day of — 1895. — Clerk.

### **Order Overruling Objections, Appointing Commissioners, etc.**

After hearing had in said circuit court, the Court overruled the objections set forth in said answer, to which defendants then and there duly excepted. The Court thereupon appointed Joseph R. Ryan, H. M. Gorham and H. M. Clemmons, as commissioners, to ascertain and assess the compensation to be paid to the defendants having or holding any right, title or interest in or to the tracts of land or mining claims described in the pleadings, for and in consideration of the appropriation of such land to the use of said petitioners. Joseph R. Ryan was selected by plaintiff and petitioner; H. M. Clemmons was selected by the defendant, Red Jacket Consolidated Mining Company, a corporation. Afterwards, and before the taking of testimony, the Goodman Mining Company, mentioned in the amended complaint, was by the order of the Court made a party plaintiff, and thereafter the suit proceeded in the names of J. M. Douglass and the Goodman Mining Com-

pany, plaintiffs, against the defendants above named. Before the hearing was concluded, the South End Mining Company settled with the plaintiffs, and the matter proceeded as if the compensation, if any, to be paid to the South End Mining Company, had been paid by petitioners. The said commissioners met at a time and place ordered by the Court, and before entering on their duties were duly sworn as required by the statute of the State of Nevada, entitled "An Act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada," approved March 1st, 1875. The commissioners then viewed the several tracts of land mentioned in the petition and amended complaint. Afterwards the said commissioners appointed by the Court filed their report and findings, which is in words and figures, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}
Petitioners,	
vs.	
JAMES D. BYRNES, ET AL.,	
Defendants.	}

### **Report of Commissioners.**

To the Honorable, the above-named court:

The commissioners appointed by said court to ascertain and assess the compensation to be paid for a right of way for the tunnel mentioned in the above-entitled proceedings report as follows: We met as ordered by said court in Virginia City, on August 21, 1894, and duly qual-

ified, and thereafter viewed the premises in controversy, and heard the allegations and proofs of the parties and arguments of counsel, regularly adjourning from time to time, and having duly considered the same now find the facts as follows, to-wit:

First: We find that petitioner J. M. Douglass is the owner of an undivided one-half interest in and to the Contact mine, and the tunnel therein, and that defendants, H. C. Biggs and Maggie Lee McMillan, are the owners each of an undivided one-fourth interest in same. That James D. Byrnes and Edward Mulville are the owners of the Atlantic Consolidated mine. That H. C. Biggs and Maggie Lee McMillan are the owners of the Annie, and of the Clinton mine. That the Red Jacket Mining Company is the owner of the Red Jacket mine, the right of way through the South End being conceded by the owners.

Second: We find that petitioners, J. M. Douglass and the Goodman Gold and Silver Mining Company, are entitled to the right of way seven and a half feet wide by seven and a half high as now run for the tunnel in controversy from its mouth on the Contact mine through 299 feet thereof; through the Atlantic Consolidated mine 265 feet thereof; through the Annie mine 173.3 feet; through the Red Jacket Consolidated mine 91 feet thereof, and through the Clinton mine 227.9 feet thereof, and to the exclusive use of the same, and if the owners of any of said claims desire to use said tunnel, they must either negotiate with said petitioners or proceed to condemn the same.

Third: We find that while there may have been some spots of good ore in the Annie and Clinton mines taken out in extending the tunnel in controversy, it was not in

sufficient quantities to be of any practical value, and as there is nothing to show that this ore was vitally thrown away, we find that no damage has accrued by reason of it, and we assess none.

Fourth. We find that The Red Jacket Consolidated Mining Company is entitled to the ore at the mouth of said tunnel, estimated at iron ten to fifteen tons, and that this represents the amount of ore taken from that mine in extending said tunnel.

Fifth. We find that said right of way through the Contract, Anne, Red Jacket, South End and Clinton mines, or either of them, is of no damage to said mines, and of no value, and no compensation should be paid by petitioners for said right of way through any one of them.

Sixth. We find that the right of way through the Atlantic Consolidated mine is of the value of one thousand twenty-one dollars and ninety-five cents, and we accordingly assess the damages to said mine at said sum, to be paid to defendants, James D. Byrnes and Edward Anville, the owners.

Respectfully submitted,

JOS. R. RYAN,

H. M. GEORGEHAM,

H. M. CLEMMONS,

Commissioners.

Virginia City, Nevada, September 1, 1894

Filed Sept. 4, 1894.

The defendants, except The South End Mining Company, within twenty days after the time of filing said report, and after ten days notice to petitioners and plain-

tiffs, moved said circuit court to set aside said report and grant them a new trial as to the tracts of land or claims owned by the defendants respectively. The objections filed by said defendants, with their notice and motion, are in the words and figures following, to-wit:

*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}
vs.	
JAMES D. BYRNES, ET AL.,	
Defendants.	

### **Motion for New Trial and Objections.**

And now come the defendants in the above-entitled action, and for their objections to the report of the commissioners filed in this case, show to the Court:

#### I.

The first finding in the report is incorrect, against law and not supported by the evidence, in the following particulars:

A. The evidence shows that J. M. Douglass is not the owner of an undivided one-half interest in or to the Contact mine, or to the tunnel therein, but, on the contrary, the evidence shows that he holds the legal title to said Contact mine, and to the tunnel therein, as trustee for the defendants, James D. Byrnes and Edward Mulville; that, at the time he acquired the legal title to said Contact mine, he, at the same time, and as part



of the same transaction, and for the same consideration, acquired, by an agreement in writing, the lease of the Atlantic Consolidated mining claim from the Atlantic Consolidated Mining Company, the grantors and predecessors in interest of the defendants, Byrnes and Mulville; that said lease was made by said Atlantic Consolidated Mining Company to W. H. Stanley, from whom said J. M. Douglass acquired the legal title to said Contact mine and said lease, by his agent, Muhlbeier; that said W. H. Stanley entered into possession of said Atlantic Consolidated mine, and of the said tunnel, which was and is a part of said mine and appurtenant thereto, under said lease, and while he was in possession thereof, he acquired the legal title to said Contact mine, for the use and benefit of said Atlantic Consolidated Mining Company, and held the same in trust for said company, and that when said W. H. Stanley assigned said lease to Muhlbeier, the agent of J. M. Douglass, and conveyed said Contact mining claim to said Muhlbeier, the latter was acting as and was the agent of J. M. Douglass for said purposes, and as such agent, with possession of said Contact mining claim and said tunnel and said Atlantic Consolidated mine as the tenant of said Atlantic Consolidated Mining Company; that, at the time when said deed and said agreement of lease were made to said Muhlbeier by said W. H. Stanley said J. M. Douglass had full knowledge of the fact that said W. H. Stanley held said Contact mine as the tenant of said Atlantic Consolidated Mining Company and held the same as such tenant, at the time when these proceedings were commenced.

B. The evidence shows that said defendants, H. C. Biggs and Maggie Lee McMillan, acquired their interests in the undivided one-half of the Contact mine with full knowledge of the fact that Andrew Charles and Mielievich, their predecessors in interest and grantors, held the legal title to said Contact mining claim as tenants of the Atlantic Consolidated Mining Company, and had acquired the same while in the possession of the Atlantic Consolidated Mining Company, as its tenant.

C. The evidence shows that said tunnel was a part of and appurtenant to the Atlantic Consolidated mining claim; that it was constructed by said Atlantic Consolidated Mining Company and its predecessors in interest, and that it was constructed at a time when the land enclosed within the boundaries of the Contact mining claim was public land of the United States; and the evidence shows that said land is still public land of the United States.

D. The evidence shows that said tunnel is absolutely necessary to the defendants, Mulville and Byrnes, for mining and drainage purposes, in connection with and as a part of the Atlantic Consolidated mine.

E. The evidence shows that this defendant, (?) J. M. Douglass, and one Andrew Charles, who was his silent partner in said lease, and for whom Mielievich held the legal title to the Contact mining claim, entered into possession of said Contact mining claim and said tunnel, and said Atlantic Consolidated mine, as tenants of the Atlantic Consolidated Mining Company, and continued in possession thereof, as such tenants, until defendants, Byrnes and Mulville, and their grantors, acquired title to



said Atlantic Consolidated mining claim, when, by reason of such acquisition, said Douglass and Charles became the tenants of defendants, Byrnes and Mulville, and their grantors, and continued so until the time these proceedings were commenced.

F. That neither W. H. Stanley, F. A. Muhlbeier, nor J. M. Douglass, could, by reason of their relations as tenants to defendants, Byrnes and Mulville, and their predecessors in interest and grantors, acquire any adverse title either to said Contact mining claim or to said tunnel, as against their landlords.

## II.

These defendants object to the second finding of the commissioners, on the ground that the said commissioners have and had no power to find any matter or thing with reference to the right of way except as to the ownership of the claims through which the right runs, and the just compensation to be paid to the owners of such claims; nor had such commissioners any power or authority to find that petitioners have the right to the exclusive use of such right of way, nor that, if the owners of said claims, or any of them, desire to use said tunnel they must either negotiate with said petitioners or proceed to condemn the same.

## III.

Defendants object to the third finding on the ground that it is not supported by the evidence: The evidence shows that good pay ore extends through the Annie, Clinton, and Red Jacket mines, that it was in sufficient quantities to be of practical value, that the ore was wilfully and maliciously thrown away by defendant (?) Douglass, and

his employees, and that the ore thrown away was as rich, if not richer, than that taken out immediately adjoining the bottom, sides and top of the tunnel. Said finding three is based upon the opinion of witnesses, and not upon the evidence of those who know the facts, and it is directly contrary to the evidence, as the evidence shows that J. M. Douglass was repeatedly notified by the men employed to extend the tunnel through the Red Jacket, Annie and Clinton claims, that the ore was rich and should be saved, and he neglected to provide any means to save said ore, and, in effect, told the men to throw it away, and that, instead of the throwing of the ore away being of no damage to the owners of the mine, it was of great damage to the owners of the mine; the net value of the ore taken from the Red Jacket mine and thrown away being \$5,040.00, that taken from the Annie mine being \$1,140.00, that taken from the Clinton mine being \$4,900.00, and damages in these sums should have been awarded to the owners of the said claims respectively.

#### IV.

Defendants object to the fourth finding of fact on the ground that the evidence shows that the ore at the mouth of the tunnel is ore mixed with waste, and of no practical value by reason of its having been taken from the mine with the waste, and that 84 tons of ore were taken from the Red Jacket mine by J. M. Douglass and thrown into the creek.

#### V.

The fifth finding is not supported by the evidence and is contrary to law. The evidence shows that the right of way through the Contact, Annie, Red Jacket and Clinton

mines, is of damage to those mines and is of value, and compensation should be paid therefor. Such finding is contrary to law in that no person is permitted to take the property of another under such proceedings without paying a just compensation therefor. It is only by paying, or securing the payment of a just compensation, that any property can be taken for the use of another who is not the owner. The evidence shows that the said right of way through said mines is of great value.

#### VI.

The defendants object to the sixth finding on the ground that the value of the right of way through the Atlantic Consolidated mine is, at least, \$2,650.00, and that the compensation that should have been awarded to defendants, Byrnes and Mulville, for the 265 feet of completed tunnel, through the Atlantic Consolidated mine, in the sum of \$2,650.00.

#### VII.

The defendants object to the said report of the commissioners on the ground that the value of the 648½ feet of the Atlantic tunnel, after deducting all repairs made by J. M. Douglass, was and is \$5,500.00, and that sum should have been awarded to defendants, Byrnes and Mulville, and the right of way condemned, from the mouth of the tunnel to the west line of the Atlantic Consolidated claim, is of the value of \$5,500.00, which the commissioners should have awarded to the owners of the tunnel, Byrnes and Mulville.

#### VIII.

The defendants object to the report of the commissioners on the ground that they find that the defendants,

Biggs and McMillan, are the owners of an undivided one-half of the Contact mine and tunnel therein, and yet they award them nothing for the right of way through said mine and tunnel, when the evidence shows that the right of way through the Contact ground, and the tunnel in said ground, is of the value of, at least, \$2,500.00, one-half of which should have been awarded to Biggs and McMillan.

### IX.

That said report is based entirely upon erroneous views of the law, and is in direct opposition to the evidence in the case.

Wherefore, notice is hereby given that on the 2nd day of October, 1894, at 11 o'clock A. M. of said day, at the courtroom of said Court, at Carson City, Nevada, or as soon thereafter as counsel can be heard, these defendants will move said Court to vacate, annul and set aside said report as to each and every tract of land, mining claim and premises described in said report or in the petition, and as to each and all of the parties defendant, except the South End claim and South End Company, and to grant a new trial as to each of said tracts of land, mining claims and premises, and as to each defendant except said South End claim and said South End Company.

This motion will be made upon the foregoing objections, upon this notice, upon said report, and upon all the evidence on file or taken in these proceedings and upon all the records in this case.

Yours, etc.,

W. E. F. DEAL,

Attorney for Defendants, except South End Mining Co.

To F. M. HUFFAKER and J. L. WINES,

Attorneys for Petitioners.

### **Order Denying Motion for New Trial, etc.**

The motion of defendants was made upon said objections, and upon said notice, and upon said report, and upon all the evidence on file or taken in said suit or proceedings, and upon all the records in this case.

The said circuit court afterwards overruled said objections and denied said motion for new trial, by an order which is in the words and figures following, to-wit: District of Nevada, ss. In the Circuit Court of the United States for the District of Nevada, at a term thereof begun and held at Carson City in said district, on the 18th day of March, A. D., 1895. Present, the Honorable Thomas P. Hawley, presiding judge; the following proceedings were had and taken, viz: J. M. Douglass, et al., v. Jos. D. Byrnes, et al. The matter of the objections to the report of the commissioners herein, and the motion for a new trial having been heretofore argued and submitted and duly considered by the Court, it is now ordered, that said objections be and the same are hereby overruled, the motion for a new trial denied, and the report of the commissioners is confirmed. It is further ordered that the costs of this proceeding shall be paid by the petitioners; and that the compensation of the six commissioners shall be ten dollars per day, and incidental expenses, amounting to \$31.00, and \$8.00 for team to inspect the premises; also the sum of \$101.00 to Alfred Chartz for taking and reporting the testimony. It is further ordered that defendants have thirty days in which to file their statement or bill of exceptions herein.

And be it further remembered, that within the time allowed by law and as extended by the order of said circuit court, and as stipulated and agreed in writing by the attorneys of the plaintiffs and defendants respectively, came said defendants and made this, their statement on appeal and bill of exceptions in this suit, and says that the order and decree of said circuit court is erroneous and against the just rights of said defendants for the following reasons:

### **Bill of Exceptions and Statement.**

First: The evidence showed that a part of the right of way sought to be condemned consisted of a tunnel which was owned by the defendants, James D. Byrnes and Edward Mulville, who were also owners of the Atlantic Consolidated mine, for the working of which said tunnel was constructed by the predecessors in interest and grantors of defendants, James D. Byrnes and Edward Mulville. The evidence showed that at the time of the commencement of this suit and proceedings J. M. Douglass, one of the plaintiffs, was in possession of said tunnel, as tenant of the defendants, Byrnes and Mulville. That said tunnel had, before the time when J. M. Douglass became said tenant been run and completed a distance of 648 feet from its mouth, and that said tunnel was a part of said Atlantic Consolidated mine, and was the lowest adit of said mine, and the most convenient means of working the same. And these defendants show that said tunnel was, at the time of the commencement of these proceedings and suit, already used by defendants, Byrnes and Mulville, and their tenants, for mining



purposes and defendants show that said tunnel was not, under the provisions of said act of the legislature, subject to condemnation for the use of any other persons, for the reason and cause that no express or implied authority is given by said act to condemn the tunnel of one person, constructed and used for mining purposes, for the use of another for the same purpose.

As pertinent to and explanatory of the foregoing specifications, defendants show that the following evidence was given before the said commissioners at their hearings and was used upon said motion for new trial by defendants. The defendants, Byrnes and Mulville, introduced and read in evidence a patent from the government of the United States of America, dated April 29th, 1876, conveying to the Atlantic Consolidated Mining Company, the Atlantic Consolidated mining claim upon the Pacific lode, described in the complaint and answer in these proceedings. Defendants also introduced and read in evidence a judgment of the District Court of the State of Nevada, rendered on June 24th, 1891, and entered on said day in an action then pending in said court, wherein J. D. Blackburn was plaintiff, and said Atlantic Consolidated Mining Company was defendant, in favor of said J. D. Blackburn, for the sum of \$1,132.00, besides interest and costs, against said last named company.

Defendants also introduced and read in evidence an execution afterwards issued out of the district court in which said judgment was rendered, tested the 26th day of June, 1891, upon said judgment, together with the sheriff's return thereon, to the effect that he, pursuant to said execution, and by virtue thereof, sold the

Atlantic Consolidated mine and premises described in the pleadings in this action, at public auction, to W. E. F. Deal for \$1,352.90, and that he, said sheriff, had given said purchaser, W. E. F. Deal, a certificate of said sale, and had filed a duplicate for record in the county recorder's office of Lyon county, Nevada. Defendants also introduced and read in evidence said certificate of sale, mentioned by said sheriff in his return, which certificate is dated July 25th, 1891. Defendants also introduced in evidence an assignment of said certificate of sale made by said W. E. F. Deal to William Feehan, dated January 16th, 1892. Defendants also introduced and read in evidence a sheriff's deed, dated February 16th, 1892, made by W. A. Donnelly, the sheriff of Lyon county, Nevada, who made said sale under said execution, to said William Feehan, which deed was made pursuant to said execution sale, certificate of sale and assignment, and which deed conveyed said Atlantic Consolidated mining claim and premises to said William Feehan. Defendants also introduced and read in evidence a deed dated March 19, 1892, made by said William Feehan to James D. Byrnes and James J. Green, for a valuable consideration, conveying said Atlantic Consolidated mining claim and premises. Defendants also introduced and read in evidence a deed dated February 25, 1893, made by said James J. Green, conveying to Edward Mulville his interest in said Atlantic Consolidated mining claim for a valuable consideration. Defendants also introduced and read in evidence the lease, a copy of which is annexed to the answer in this action. Defendants also introduced an assignment in writing of said lease dated September 16,

1891, made by W. H. Stanley, the lessee in said lease to Frank A. Muhlbeier, and also an assignment of said lease dated the date last mentioned, made by Frank A. Muhlbeier to J. M. Douglass, one of the plaintiffs in this action, each of which leases was made for a valuable consideration.

At the subsequent meetings of said commissioners the petitioners offered and read in evidence the notice of location of the Contact Gold and Silver mining claim, which is in words and figures following, to-wit:

*Notice of Location.*

I, the undersigned, hereby give notice that I claim fifteen hundred (1500) linear feet (more or less) measured on this lode or vein of gold and silver bearing quartz, commencing at this monument and notice which is placed one hundred (100) feet north of the American Flat creek, and running in a southerly direction therefrom along the line of said lode, fifteen hundred (1500) feet with the dips, spurs and angles of said lode, and three hundred (300) feet on each side thereof, the corners of my surface claims being marked by monuments of stone, under and by virtue the U. S. mining laws, and of the district; said claim shall be known as the Contact Gold and Silver Mining Claim, on the Contact lode in Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and is a relocation of the Cadiz claim, and is bounded on the north by the Big Gun, on the west by the Atlantic, and on the east by the South End claim, and on the south by unknown ground.

C. E. BROWN, Locator.

Dated on the ground, 7th, 1890. (?)

Recorded at the request of C. E. Brown, July 8th, 1890, at 20 minutes past 4 o'clock, P. M. Thomas P. Mack, County Recorder.

Also the deed from the locator, C. E. Brown, to W. H. Stanley and C. J. Millievich, which is in the words and figures as follows, to-wit:

This indenture made the 13th day of June, in the year of our Lord one thousand eight hundred and ninety-one, between C. E. Brown of Yuba County, State of California, the party of the first part, and W. H. Stanley and C. J. Millievich, of Virginia City, Storey county, State of Nevada, the parties of the second part, witnesseth:

That the said party of the first part for and in consideration of the sum of fifty dollars (\$50) lawful money of the United States of America, to him in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, remised, released, and forever quitclaimed, and by these presents, does grant, bargain, sell, remise, release, and forever quitclaim unto the said parties of the second part and to their heirs and assigns all that certain mining claim situate and being in the Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and described as follows, to-wit: All that certain mining claim known as the Contact Gold and Silver Mining Claim, located by C. E. Brown, July 7th, 1890, and bounded and described as follows, to-wit: Fifteen hundred (1500) feet (more or less) measured on the lode or vein of gold and silver mining quartz, commencing at the monument and notice which is placed one hundred (100)

feet north of the American Flat creek and running in a southerly direction therefrom along the line of said lode fifteen hundred (1500) (?) with the dips, spurs and angles of said lode, and three hundred (300) feet on each side thereof, the corners of the surface claim being marked by monuments of stone under and by virtue of the U. S. mining laws of the district, the above described mine being known as the Contact Gold and Silver Mining Claim, on the Contact lode in the Devil's Gate and Chinatown Mining District, Silver City township, State of Nevada, and is a relocation of the Cadiz claim, and is bounded on the north by the Big Gun, on the west by the Atlantic, on the east by the South End claim, and on the south by unknown ground. Notice of the location of the above described mining claim is recorded in book "A," page 99, of mining locations and assessment records in the recorder's office, Lyon county, State of Nevada. Together with all the dips, spurs and angles, and also all the metals, ores, gold and silver mining quartz, rock and earth therein; and all rights, privileges and franchises thereto incident, appendant and appurtenant, or therewith usually had and enjoyed; and also all and singular the tenements, hereditaments and appurtenances thereto belonging, in any wise appertaining, and the rents, issues and profits thereof; and also, all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as equity, of the said party of the first part, of, or in, or to the said premises, and every part and parcel thereto with the appurtenances. To have and to hold all and singular the said premises, together with the appurtenances and privileges thereunto incident, unto the said

parties of the second part and to their heirs and assigns forever.

In Witness Whereof, the party of the first part has hereunto set his hand and seal the day and year first above written.

C. E. BROWN. [Seal]

Signed, sealed and delivered in the presence of

.....

State of California, }  
County of Yuba. } ss.

On this 13th day of June, in the year of one thousand eight hundred and ninety-one, before me, J. K. Hare, county clerk and ex-officio clerk of the superior court in and for the said county of Yuba, personally appeared C. E. Brown, personally known to me to be the same person whose name is subscribed to the within instrument, and acknowledged to me that he executed the same freely and voluntarily for the uses and purposes therein mentioned.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said court the day and year in this certificate first above written.

[Seal]

J. K. HARE,

County Clerk and ex-officio Clerk of the Superior Court.

Filed for record at request of W. H. Stanley, June 16, 1891, and recorded in Vol. "H" of mining deeds, page 643, Lyon County records.

THOMAS P. MACK,

County Recorder.

Also deed from W. H. Stanley to Frank Muhlbeier, conveying an undivided one-half interest in the Contact



Gold and Silver mining claim, being identically the same ground conveyed by C. E. Brown to W. H. Stanley and C. J. Millievich, fully described in the foregoing deed bearing date September 16, 1891, duly acknowledged and executed by W. H. Stanley and recorded September 18, 1891, at request of J. M. Douglass, at 30 minutes past 9 A. M., in book "H" of mining deeds, page 681, records of the county of Lyon, State of Nevada.

THOMAS P. MACK,  
County Recorder.

Also deed from Frank Muhlbejer to J. M. Douglass conveying an undivided one-half interest in the Contact Gold and Silver mining claim, being identically the same interest conveyed in the same ground by W. H. Stanley to Frank Muhlbejer fully described in the deed from C. E. Brown to W. H. Stanley and C. J. Millievich, already printed in the foregoing pages. Said deed from Frank Muhlbejer to J. M. Douglass bears date September 16, 1891, and was duly acknowledged and executed on September 16, 1891, and was recorded at request of J. M. Douglass, September 18, 1891, at request of J. M. Douglass at 10 o'clock A. M. in book "H" of mining deeds, page 683, records of the county of Lyon, State of Nevada.

THOMAS P. MACK,  
County Recorder.

Petitioners also read and introduced in evidence the lease from the Atlantic Consolidated Mining Company to W. H. Stanley, which said lease appears in full in this statement on appeal and bill of exceptions at page 26.

Upon the hearing, the following testimony was given by witnesses, who, before testifying, were duly sworn:

T. P. MACK, a witness called on the part of petitioner on the hearing of the petition in the U. S. Circuit Court, being duly sworn, testified as follows:

I am a surveyor and civil engineer, and I am acquainted with the ground in controversy called the Goodman Contact tunnel and the ground through which it passes; I have surveyed it for Mr. Douglass, the petitioner from its mouth to the Goodman mine; it now extends 150 feet into the Goodman ground; I have known the Contact mine under that name three or four years; it was originally called the Cadiz; five or six years ago that ground became subject to relocation and I relocated it, and then I failed to do the necessary assessment work and C. E. Brown relocated it and called it the Contact.

Mr. Mack was subsequently recalled and testified as follows:

I have resided in Lyon county thirty-one years and have been connected with mining more or less during that time; I am acquainted with the Devil's Gate and Chinatown Mining District, where this ground in controversy is situated. The mouth of the tunnel in controversy is near the easterly line of the Contact ground.

I made this map shown me from actual surveys made by myself and from U. S. surveys of the patented claims in the neighborhood. That tunnel as laid down on the map represents the course actually followed from its mouth on the Contact to its end at that time in the Goodman ground. The tunnel passes diagonally through

most of the several claims as compared to their end lines. It follows a ledge formation after it gets in the ground a little ways from its face to the Goodman ground, all the way. The course of the ledge formation is the same as the tunnel—south of west. The ledge formation followed by the tunnel crosses the mining locations on the course of the tunnel diagonally. The tunnel enters the side line of the Atlantic and goes out of its side line, and also of the Annie; it enters the side line of the Red Jacket and passes out of its side line, and it enters the side line of the South End and passes out of its side line, and it enters the side line of the Clinton and passes out of the side line and enters the Goodman. With reference to other ledges that might be found running with the course of the locations made, the ledge followed by the tunnel might be called a cross-ledge.

There are places in the tunnel where the tunnel is timbered, and I could not see the ledge formation on that account. I think there is a ledge formation where they began the new work of extending the tunnel. Within the ledge there are spots that look like good ore. Some spots would pay to extract and work, but I don't think it is continuous. There are places for quite a distance in that tunnel where I don't think the ore would begin to pay to take out and mill, and there are other places that I think would pay, and the rule to take a certain length, width and highth, multiplied and divided by 13 to ascertain the number of tons of pay ore extracted in excavating the tunnel would not apply in taking the entire length of the tunnel. I don't know that I could make an estimate of the number of tons of pay ore extracted in running the tunnel, because I don't know the length of

the spots that would be pay ore. In the Annie ground I don't think half of the distance would pay; I don't think half of the distance would pay in the Red Jacket. As to the Clinton, I think possibly half of the distance would pay to extract. That would be my judgment from what I saw. I cannot give a definite opinion. I call it a spotted ledge.

These several mining claims had no marketable value in 1890, unless the Red Jacket and the Atlantic had ore that was developed in their former workings, and their value would be entirely speculative according to my idea. Since the construction of this tunnel, I don't think the marketable value of the Atlantic has been changed; I should say the Annie was worth more to-day with the tunnel; it is worth more now than it was before the ore was exposed in it, and I would say the same with reference to the Red Jacket and Clinton. A mine is usually considered more valuable and you can sell it to better advantage if you can go and show ore in it that will pay. It is my judgment that the running of that tunnel has benefited those mines.

Really, I don't see where any of those mining claims have been actually damaged, except to the extent of the pay ore extracted in running the tunnel. That would be the only way I would estimate the value of the right of way, by figuring the amount of pay ore taken out by the tunnel excavation, and I cannot see where any damage would accrue outside of that. When the tunnel was half way through the Annie, the land was unappropriated and vacant, and subject to location by any one, and it had no marketable value, and I would say the same of the Clinton; the Red Jacket was a mine for a long time and the

parties had a perfect title to it. The damage to that mine would be the amount of pay ore taken out. I would pay more for those claims now than I would before the tunnel was excavated through them. I can see no damage can result to the Annie by the appropriation of  $7\frac{1}{2}$  feet square of ground as a right of way for the tunnel, or to the Jacket or the Clinton.

There is an eight-inch drain pipe follows the tunnel in its construction, and it will drain out of that tunnel 34.8 miner's inches. I think it would answer every purpose of drainage.

There is nothing in the construction of that tunnel that would prevent the extraction of the ores found in the several claims through which it passes, and running the same out of the tunnel in mining cars.

I was present in the tunnel when Judge Blackburn, J. F. Angell, Mr. Ray and Mr. Lacrouts were there taking samples. Mr. Angell picked the rock down, and Judge Blackburn put them up, and Mr. Ray had the sacks and I marked them where they were taken. The samples were taken only where the ledge showed in the tunnel, and none were taken from barren places; I understood it to be their object to get a fair average of the value of the ore shown in the tunnel, and I think they selected them that way. I think if they had taken the samples at shorter intervals that the average value shown by them would have been lower. We skipped places on account of the ledge being barren. I cannot form any estimate of the value of the ore taken from those mines or any of them by the excavation of the tunnel. The ledge shows in the roof of the tunnel and sides and bottom in

some places, and in some places it is good and in other places it is worthless, and I don't know the proportionate length of the good or of the bad places. The general dip of the ledge is perhaps 50 degrees from the horizontal.

I made the survey for the Annie location. I never saw any croppings on it; I never went over the entire surface of the Annie ground; I went around the boundaries. The location was made to take an unoccupied and unappropriated piece of ground lying between the Big Gun, and the Red Jacket, South End and Atlantic. There is an immense outcrop on the Clinton ground above the railroad track, and it is partly on the Goodman, Red Jacket and Clinton ground. It is a large and nearly circular outcrop.

I don't think the value of all the ore taken out by the excavation of that tunnel would be as great as the increased value of the mines by reason of the ore discovered by the running of the tunnel.

#### *Cross-Examination of Mr. Mack.*

Under cross-examination by Mr. Deal, Mr. Mack testified:

I don't think any human being can tell what the value of the ore was which was taken out by the excavation of the tunnel.

At the time I made a survey of the Annie for Mr. Biggs, I showed him where the ledge was in the Atlantic incline. It was a ledge of gold and silver bearing quartz in place. I showed Mr. Biggs where Tinney had worked on the Annie ground, and I presume there was a ledge



there. There is a ledge shown in that tunnel within the Annie and Clinton, and in the Atlantic incline. It runs across the Atlantic, Annie and Clinton. I think it is all the same ledge.

I never made a complete survey of the Atlantic; I surveyed the upper tunnel, and I know three tunnels there; the tunnel through which right of way is sought to be condemned is the lowest tunnel through which the Atlantic ground can be worked; that tunnel is necessary to the working of the Atlantic as a drain tunnel. I think most of the water coming out of the tunnel now comes from the Atlantic ground.

I have no doubt but that the tunnel on this diagram marked "Tunnel" is the very same tunnel that Douglass took as part of his right of way.

The Cadiz claim and the Atlantic Consolidated Mining Company's claim constituted the property of the corporation; in consequence of their failure to do work on the Cadiz claim, I made the location; when I made the location J. D. Blackburn was in possession of the mining claims holding them for the Atlantic Consolidated Mining Company as watchman; it was located in my name and it was understood between us that he was to be interested in it; he said it was vacant and I located it.

If more than 34.8 inches of water was to be struck, that 8-inch pipe would not carry it off; a sufficient rush of water would tear the tunnel down and the timbers and destroy the tunnel.

We tried to get a sample every thirty feet; if we found the tunnel timbered we would go a few feet further or step back a few feet, and if it was barren we would do

the same thing. We commenced sampling at the ledge and tried to get a sample every thirty feet. If I was buying a mine I would prospect and sample the richer places, and put no valuation on the balance; I would measure the length and width and height of the ore in sight, and get as good an average as possible, and average the value of it; there is no other way a business man would buy a mine, except in the way I have described. It is possible but not probable that between the points where samples were taken richer ore could have been got. If a certain grade of ore showed at the top and at the bottom of the tunnel it is presumable that the same kind existed between, and if it was barren above and barren below it is probable it was barren between, in the tunnel itself.

Assuming that Byrnes and Mulville owned the first 648½ feet of constructed tunnel, it is no advantage to them that Douglass took that constructed tunnel and paid them nothing for it; it is an injury to them; it is an injury to them to the extent of the cost of the tunnel if they needed the tunnel; they needed the tunnel for drainage purposes, and I think they needed it if they built it.

If a man owned a piece of mining ground, and I wanted to run a tunnel through it to reach my own ground, I would go to the owner and make my arrangements.

#### *Redirect Examination.*

Mr. Mack testified, on redirect examination by Mr. Huffaker, as follows:

I made a memorandum of the places where the samples were taken, and it fairly represents the average value of the ore in that ledge as followed by the tunnel from one mine to the other. The ledge is continuous but

not the pay. There are stopes where ore was taken out of the Red Jacket for less than one-half of the entire distance. I could not form any estimate of the value of the ore taken out of those stopes, but a man naturally works where he can get the most money in the shortest time with the least labor.

Q. I will ask you to look at your map for a moment—what location upon the ground does that patent indicate?

A. It indicates lot No. 111, as marked on the map in yellow.

Q. Does the patent include anything else in its description except what is in yellow on the plat?

A. I can tell by reading it.

Q. Does the coloring determine the ground or the description in the patent?

A. I should judge the coloring there would describe it.

Q. I will read you the description in the patent: Beginning at a post marked No. 1, U. S. survey No. 111 from the southwest corner of section 8, in township 16 north, of range 21 east, Mount Diablo meridian bears south 41 degrees, 15 minutes west at a distance of 3172 feet; thence from said post south 82 degrees east 200 feet to post marked No. 2, U. S. survey No. 111; thence south 8 degrees west 1800 feet to post marked No. 3, U. S. survey No. 111; thence north 82 degrees west 200 feet to post marked No. 4, U. S. survey No. 111; thence north 8 degrees east 1800 feet to place of beginning, containing 8.26 of an acre of land, more or less, and embracing 1800 linear feet of said Pacific lode, to-wit: 600 linear feet northerly and 1200 linear feet southerly from discovery stake on said lode as represented by yellow shading in the following plat:

Q. Is the tunnel included within those boundaries?

A. The tunnel is not within those boundaries as called for by those courses and distances.

Q. Is the Contact claim included within those boundaries? A. No, sir.

Q. When the description says that the claim is represented by the yellow shading, does not the yellow shading show what is claimed?

A. The surface of the claim is embraced in the yellow shading, and that yellow shading does not embrace either the Contact claim or any part of it, or the mouth of the tunnel in dispute here. If it had done so I could not have relocated the Cadiz claim.

Q. Is it the practice of engineers and surveyors in platting claims upon which patents are issued to mark other objects upon the plat in connection with the ground patented?

A. It is necessary that other objects should be marked, such as ravines and surroundings for purposes of identification.

Q. And it is not for the purpose of describing any other ground?

A. I don't understand it as such.

Q. Have you not often seen and made yourself maps for patents and the government would issue the patent and color the surface of the ground patented and other claims in the neighborhood of it?

A. Yes, that is frequently done; I can show you where contiguous claims were so marked, and I presume it is done for the purpose of identification. Other patented claims will be indicated on the map as well as the claim that is being patented.

In answer to a question by Mr. Wines, witness said the barren spots predominate in extent throughout the tunnel.

*Examination by Mr. Deal.*

Q. Is not it common for surveyors when making a survey and platting a claim on application for patent to lay down the shafts and tunnels, by doing which work the party was entitled to patent? A. Yes, sir.

Q. A party applying for patent has to show that a certain amount of work has been done upon his claim before he is entitled to patent? A. Yes, sir.

Q. You have no doubt in the world that the tunnel in dispute here was laid down on that map by reason of the fact that the party applying for patent had to show that he done the necessary work to entitle him to patent?

A. Yes, sir; the tunnel as now constructed actually reaches the ledge, and it runs continuously for several hundred feet beyond.

Q. If you had surveyed that claim on application for patent, and if as a matter of fact the Atlantic Consolidated Mining Company had run that tunnel as part of their work, would you have put that tunnel down as it is?

A. Yes, sir.

Q. When you located the Contact, did you claim that tunnel as part of your location?

A. A man in locating ground——

Q. Did you claim that tunnel when you located that ground—did you claim that you acquired any right to that tunnel when you located that ground?

A. No, sir.

Q. You know who that tunnel belonged to?

A. I will tell you why I located.

Q. I don't care why you located. I am asking you whether when you located the Contact you claimed this tunnel?

A. I claimed anything I could hold under the location.

Q. Did you claim that tunnel as a matter of fact?

A. In locating the ground I claimed the ground and everything appertaining to it.

Q. You knew when you made that location that Judge Blackburn was the watchman of the Atlantic Consolidated Mining Company? A. Yes, sir.

Q. Do you mean to say that in view of that fact that you claimed that tunnel by virtue of the location of the Contact?

A. I did not understand that Blackburn being the watchman held the property by that fact alone.

Q. You knew that he was put in charge of the property for the Company?

A. Yes, sir; I also knew that a man could not hold ground as a mere watchman without doing the necessary work upon it.

Witness further testified:

The tunnel penetrated the ledge of the Atlantic and the Atlantic ground before he made the location of the Contact.

The cost of putting the tunnel in working condition ought to be deducted from the cost of original construction and the difference paid for the right of way as a proper reimbursement for the use of what had been done in the tunnel. I think the tunnel could be run for \$5 or \$6 a foot at the prices they take contracts to run tunnels at Silver City for the present time, and the price of clean-



ing the tunnel and putting it in repair should be deducted from that. Whatever it might cost to repair the 265 feet of tunnel run in the Atlantic ground I would deduct from the cost of the right of way and cost of excavation, which I would fix at \$5 or \$6 a foot. If the Atlantic Company desired to work their ground through that tunnel it would have been necessary for them to have repaired the tunnel before they could do it, and it would cost them as much as it cost the parties who did the work.

J. D. BLACKBURN, a witness called on the part of petitioner, testified as follows:

I have lived over 21 years in Silver City, and have engaged more or less in mining during that time, and I am acquainted with the Devil's Gate and Chinatown Mining District, and the mining locations there; I know the tunnel in controversy running from the Contact to the Goodman mine. I knew it first in 1872 and have known it continuously since. It was in something near 300 feet in 1872. In 1878 the tunnel had been run a great deal further than I first spoke, and it all caved to a certain point. I never was in any further than the cave. It was something like 400 feet in where the cave stopped the tunnel up. Prior to 1891, when Douglass took this tunnel there had not been any work done in it since 1882.

I know the Annie, Atlantic, Red Jacket, South End and Clinton; the only value any or all of those mines had then was a speculative value.

Leaving the question of ore taken out by the excavation of the tunnel, it is worth nothing for right of way through the claims through which the tunnel runs seven and a half feet square. If I was interested in those mines

through which the tunnel runs, I would say it done me good to run the tunnel if they found anything, and if they found nothing it could do me no harm, because there is nothing there, and it might save me money trying to find something myself. The tunnel run through there was of advantage to those mines, because it developed their property without expense to the owners. The running of the tunnel was worth to the owners of the mines through which it ran about ten times what the value of the ore taken out by the tunnel was. There was nothing there to take out to amount to anything. I don't see anything left there that is worth anything in sight in that tunnel, and that is a pretty good sign they didn't strike anything that was worth taking out. I recently made an examination of the tunnel with Mr. Angell, Mr. Mack, and Mr. Ray, and we took samples and I had assays made of them. The first sample was taken within one or two feet of the Annie line. Mr. Angell had a pole pick and dug the samples down from all over the ledge, and I picked them up and put them in sacks, and Mr. Ray from Dayton marked the sacks, and Mr. Thomas P. Mack had a note book, and he marked where the samples were taken from, and we paced off ten steps for each sample, but if there was no ledge or ore there at the end of each ten steps, we would have to go further until we got to the ledge; we didn't take any samples except from places where there was a ledge. We endeavored to get an average of the value of the ore; there is places where the ledge is barren; I think we took fair samples. It is a spotted ledge, and it is barren in places in the Annie, Red Jacket, and Clinton mines. The samples show the ledge to be

worth more than it is, if anything. There was very little pay ore taken out of the tunnel, if any. I have made a memorandum of these assays from these samples.

I have struck an average of the width of the ledge and of the ore followed by the tunnel, in my opinion, counting the barren places where there is no quartz, and I count three inches of solid quartz in one solid body. I figure it out to be about three inches, allowing for the barren places where there is not a particle of ledge at all; I don't believe it is over three inches of solid quartz. I have the statement here written out, and it is my honest judgment that it is a correct calculation of the matters it contains. I have stated the matter thoroughly, and I don't believe anybody can show anything more than I have shown in that statement.

*Examination by Mr. Deal.*

I swore in the District Court that I knew Yule, the Superintendent of the Atlantic Consolidated Mining Company, and that he worked the Atlantic claim through the other tunnels and through the lower tunnel, too, and it is true. That was in 1878.

*Memorandum of J. D. Blackburn.*

To the Hon. Board of Commissioners appointed by the U. S. District Judge to assess damages, if any, caused by J. M. Douglass in running tunnel through the Annie mine, Red Jacket mine and Clinton mine:

The following is the best judgment of the undersigned as to width of ore in the several mines passed through and the amount of ore taken out and the value thereof in

round numbers allowing the gold ore to mill 100 per cent and silver at 100 cents on the dollar. In the Clinton mine, you will notice that silver predominates, which must be considered. I have examined the ledge personally and taken samples from all of the above said mines and have had them assayed. The result of said assays accompany this report for your inspection.

*Annie Mine, Average Width of Ledge Three Inches Solid Quartz.*

	Gold.	Silver.	Total.
Assay No. 1.....	\$18 08	\$3 77	\$21 85
Assay No. 2.....	1 50	1 13	2 63
Assay No. 3.....	4 51	7 54	12 05
Assay No. 4.....	3 01	1 88	4 89
Assay No. 5.....	3 76	75	4 51
Assay No. 6 .....	4 51	94	5 45
			\$51 38

Divided by 6.

Length of tunnel, 265 feet.

Width of ledge average three inches solid quartz.

In many places no ledge visible, only a seam with clay to indicate where the ledge runs; allowing 13 cubic feet to the ton solid quartz unbroken, making 38 tons of ore in the Annie mine, at \$8.56 per ton, total value..\$325 66  
 Less cash for milling and hauling..... 256 30

Net cash... ..\$ 60 16

*Red Jacket Mine.*

	Gold.	Silver.	
Assay No. 1.....	\$24 11	\$4 33	\$28 44
Assay No. 2.....	6 02	2 45	8 47
Assay No. 3.....	9 04	4 14	13 18
Assay No. 4.....	9 04	5 09	14 03
			<hr/>
Total.....			\$64 22
Average.....			16 05

Length of tunnel, 91 feet. In many places no ledge visible. Average width of ledge 3 inches solid quartz unbroken.

Allowing 13 cubic feet unbroken quartz to the ton, making 8½ tons of ore at \$16.05 a ton makes.....	\$136 42
Cost of milling and hauling.....	57 38
	<hr/>
Net cash.....	\$ 79 04

*Clinton Mine.*

	Gold.	Silver.	
Assay No. 1.....	\$ 6 02	\$ 8 29	\$14 31
Assay No. 2.....	18 09	23 37	41 45
Assay No. 3.....	13 55	6 78	20 33
Assay No. 4.....	0 37½	0 56	0 93·2
Assay No. 5.....	0 75	0 94	1 69
Assay No. 6.....	0 37½	0 56	0 93·2
Assay No. 7.....	1 50	0 75	2 25
Assay No. 8.....	0 75	0 56	1 31
			<hr/>
Total.....			\$83 21
Average.....			10 40

Length of tunnel, 227 feet. Average width of ledge 3 inches, allowing 13 cubic feet to the ton of solid unbroken quartz, making 33 tons of ore at \$10.40 per ton. .	\$343 20
Less hauling and milling. . . . .	231 45
	<hr/>
	\$121 45

It is only the bunches or well defined parts of the ledge that can be taken out as pay ore, so as to take it clean without too much waste. Where there is nothing but ribbons of ore it is impossible to save it, no matter who takes it out. Then again I have given in making up the amount of ore in the ledge  $7\frac{1}{2}$  feet in hight, when in reality it is nothing of the kind. For illustration: The ledge appears at the top of the tunnel on the right-hand side and pitches to the left side at an angle of about 40 degrees. The ledge if in ore would not be over five feet at the most liberal estimate. So you see there would be  $2\frac{1}{2}$  feet lost in my estimate which I have given credit for in my 3 inches of solid quartz as the estimate. In loose quartz as it is in this case it may possibly be  $4\frac{1}{2}$  or 5 inches, but I figured it from a solid quartz basis, 13.05 cubic feet to the ton, 166 pounds to the cubic foot, and 2000 pounds to the ton.

Now, gentlemen, this is my best judgment in this matter after carefully inspecting the mine, having no claims as an official expert on mining, but only as a miner.

I am respectfully yours,

J. D. BLACKBURN.

MR. BLACKBURN was subsequently recalled and testified as follows:

I should think this tunnel was of great value to the mines instead of being a damage to every one of those



claims. In the first place, in the Clinton ground the tunnel must be 400 feet deep there. That tunnel has cut a ledge in the Clinton 400 feet below the surface, and I should consider that a valuable discovery for the Clinton mine. The South End is the next, and they discovered a ledge there, which is demonstrated to be the same ledge, because they have followed the same ledge all the way; next they discovered a ledge in the Red Jacket, which is the same ledge, and the Red Jacket Company never knew they had that ledge to my certain knowledge, because I had charge of that property for 15 or 16 years and done all the work and never knew anything about it. The next is the Annie, they found a ledge in there. It was at first called the West Atlantic, and that is where the Atlantic Consolidated came in. It was afterwards located and called the Annie. They discovered a ledge there that they never knew anything about. In the West Atlantic they had a tunnel, too. It was run from the Atlantic Consolidated to the Annie ground.

If you had to run a tunnel to the Clinton to get the ore it would not pay to do it. I should consider the advantage to the mine largely in excess in value to the value of all the ore they could possibly have taken out by running the tunnel. In the first place it has been proved by that tunnel that they have a ledge in there 400 feet deep, and on the croppings of the Clinton there was some very rich spots taken out years ago, and the tunnel has demonstrated that the ledge runs down, and by going deeper it may make into a larger ledge, and I consider that a great advantage to them.

This tunnel in 1891 was open for 430 feet, and there was

some little spots that was caved, and you could get in it well enough. I have been in hundreds of times. There has been no work done in that tunnel since 1882. The last work done there was done in a new tunnel on the Atlantic mine in 1887, by John Yule, its superintendent. I worked for him as foreman and bookkeeper, and we worked that year about six or seven months. We run the new tunnel in 395 feet.

*Cross-Examination.*

Mr. Blackburn testified in cross-examination as follows:

Q. You were in possession of this very tunnel in controversy at one time for the Atlantic Consolidated Mining Company as its watchman?

A. No, sir. It was the upper tunnel I was in possession of. I was in possession of the tunnel on the Atlantic ground, and I was not in possession of this tunnel on the Contact.

Q. Didn't you testify in the case tried in the District Court of the State of Nevada, Storey county, in the action entitled James D. Byrnes and Edward Mulville against J. M. Douglass, on behalf of the plaintiffs in that case?

A. I believe I did.

Q. I wish you would listen to this testimony, and I will ask you if you did not so testify in that case: "Q. Afterwards this corporation that you got judgment against as watchman of their property, they became possessed of the lower tunnel as succession in interest of the parties who run the tunnel? A. Yes, sir."

Q. Didn't you so testify in that case?

A. I suppose I did.

Q. Was it not for that work you got judgment against the Atlantic Consolidated Mining Company, watching their property? A. Yes, sir.

Q. Didn't you further testify as follows in that case: "Q. When you went there as watchman for this company did you take possession of the lower tunnel for them and take care of it?"

A. Yes, I was in possession of that tunnel and their other property from the first of February, 1887, until I commenced suit against them for my wages." Didn't you testify to that?

A. I will answer it by a little explanation. I know I disagreed with you about that on the last commission. I had already located this Cadiz ground were the tunnel stands with a party and this all came in the suit, and I lost money, I presume which Mr. Deal knows very well, and as well as anybody, by taking some timbers out of an old shaft, and the jury charged me \$1,000 for doing it, and I say they claimed that tunnel, but they never owned it, because I had located it with Mr. Mack and Mr. Brown, and they never owned that tunnel.

Q. My question is did you testify as I have read to you?

A. I don't know; I can't explain for that testimony; that testimony was never read over to me after I gave it, and I don't know; there is some mistake about that.

Q. Were you not called as a witness by Mr. Byrnes and Mr. Mulville to prove that very thing?

A. I was, yes; you understand that as well as I do.

Q. This action was commenced by Byrnes and Mul-

ville against J. M. Douglass to recover possession of this tunnel—this lower tunnel?   A. Yes, sir.

Q. And you were called as a witness to prove that you had possession of that tunnel for them?

A. Yes, and I testified that they claimed it. But I had located that very ground myself with other parties, and they never owned that tunnel.

Q. You testified in the former proceedings before the former commission in this action, and you are the same J. D. Blackburn named as a witness in that proceeding?

A. Yes, sir.

Mr. Deal now offers the testimony of J. D. Blackburn given in the District Court, Storey county, Nevada, in the case of J. D. Byrnes and Edward Mulville against J. M. Douglass, from which he read to witness.

ALFRED CHARTZ, sworn in behalf of defendants, testified that he recognized the typewritten volume read from as a book he printed from his shorthand notes; that he reported the testimony of J. D. Blackburn correctly, according to the best of his ability and transcribed the same correctly according to the best of his ability, and that he had reported in shorthand the case mentioned by Mr. Deal in his cross-examination of Mr. Blackburn in the District Court, Storey county, Nevada.

F. S. LACROUTS, called on behalf of petitioner, testified as follows:

I have resided in Silver City since 1860, and have been engaged in mining work since, and I know the Contact-Goodman tunnel. I have examined the ledge followed by that tunnel recently; I have been there four times.

From where they began excavating the tunnel in virgin ground from the end of the tunnel where it had been run before Douglass commenced work, it is a nice formation, full of seams and little bunches of quartz, and some of it would probably pay something. It is not continuous ore, but occurs in pockets and bunches. Some places the tunnel takes the full extent of the ledge and some places would pay and other places would not pay to take out.

Since the tunnel has been run they have been in there and took some ore out, and the value of those mines is better than before the tunnel was run.

I think the tunnel cost more than the rock was worth that was taken out. The tunnel adds more to the value of the mines through which it runs than the ore taken out in running the tunnel.

The first I knew of that tunnel was in 1861 or 1862. Some parties located the ground and built a little house on that flat above the tunnel, and then these parties, Jim McGinnis and Bob Buzan, they run the tunnel to get water to fetch to Silver City, and by and by they sold it to the Water Company, or the Atlantic Company, I don't know which.

I think Buzan and McGinnis run this tunnel about 300 feet to the Atlantic ledge, but I didn't see it. They discovered the Atlantic ledge in running this tunnel for the purpose of getting water.

I think the last work done in that tunnel was in 1880 or 1881; I think now it was sometime in 1882.

Leaving out of the question the value of the ore taken out in excavating the tunnel, it is not worth anything

to the companies through whose mines the tunnel runs to run the tunnel seven and a half feet square through their ground. In my judgment the value of the right of way through any of these claims, the Annie, Red Jacket and Clinton is worth only what the ore they may have taken out in running the tunnel is worth.

I consider the running of a tunnel through a mining claim a benefit to such claim, always.

MR. LACROUTS was subsequently recalled and testified as follows:

I have known the tunnel in controversy since 1864 or 1865. Not all the time, but the best portion of it. There was a party I suppose run it to prospect in early days, and Bob Buzan bought that tunnel for water purposes, and McGinnis. Part of the water for Silver City came from that tunnel. They used that tunnel for water purposes until the present Virginia & Gold Hill Water Company bought them out. I was told they had sold their right to the Water Company. They did not carry on a water business there after that. The Atlantic Company took the tunnel and I suppose they bought their right.

The effect of the construction of this tunnel on the claims through which it passes has been good, only they fight ever since.

I think the benefit derived by these claims from the running of the tunnel is more and of greater value than all the value of the ore that may have been taken out by the running of the tunnel.

I call the ledge a gouging proposition, with little pockets here and there, and they have to sort the rock to make it worth anything.



*Cross-Examination.*

Mr. Lacrouts testified as follows on cross-examination by Mr. Deal.

I am the same Lacrouts who testified before the former commissioners in this action in the former proceeding. After McGinnis and Buzan stopped work in the tunnel they were succeeded by the Atlantic Consolidated Mining Company. The Atlantic Company continued to run the tunnel in further for a long time after they succeeded McGinnis and Buzan. I never heard of anyone claiming the tunnel after McGinnis and Buzan left until I heard it was claimed by J. M. Douglass.

I know John Yule, the superintendent of the company, worked in that tunnel for a long time for the Atlantic Company, and I know a party named Myers worked in there, too.

Q. Listen to your testimony given in the District Court, Storey county, on the trial of the case of James D. Byrnes and Edward Mulville against J. M. Douglass: "Q. Don't you know the fact that J. M. McGinnis and R. C. Buzan claimed a lode they called the Pacific lode, and they called the company locating that lode the Atlantic Consolidated Mining Company? A. Yes, I believe so." Is that your testimony?

A. Yes, I know because they showed me the ledge.

Q. Don't you know that they claimed the lode up there in that tunnel and called it the Pacific lode?

A. I know they located a lode up there, but I don't recollect the name of the lode.

Q. I will read to you to refresh your recollection: "Q.

They located this lode at the same time they were working there in the tunnel? A. Yes, and in the same tunnel." Is that correct? A. Correct.

That tunnel was always a drain and mining tunnel for the Atlantic Company. I know Judge Blackburn sitting by my side, and I know he had charge of the Atlantic Consolidated Mining Company's claim and of this tunnel as watchman for years. He sued the company for his services and recovered judgment.

F. M. HUFFAKER testified on behalf of petitioner as follows:

In the transfer of the lease of the Atlantic Consolidated Mining Company to Mr. Muhlbeier, Mr. Stanley asked me if he could assign his interest in the lease to Mr. Muhlbeier, and I told him he could assign anything he owned, but there was nothing said by anybody about anybody owning any interest in the lease or in the Contact mine, or about Mr. Stanley holding it for anybody except himself. He never asked me anything about any mining claim at all.

*Cross-Examination by Mr. Deal.*

Q. Were you instructed by Mr. Douglass to conceal the fact from Mr. Stanley that he (Douglass) in fact was the real purchaser and not Muhlbeier?

A. No, sir; Mr. Muhlbeier spoke to me about it and said Douglass sent him to me.

Q. You did not know when you drew up the papers that Douglass was putting up the money?

A. I learned that fact from Muhlbeier.

Q. Did you learn that fact before the transaction was completed?

A. Yes, he told me he was sent by Douglass to buy the Contact mine and that the lease would be transferred, and that is all he told me.

J. M. DOUGLASS, called upon the part of the petitioner, testified as follows:

I am the owner of the Contact Mining Claim under the conveyance from Frank A. Muhlbeier, which has been introduced in evidence. I constructed the tunnel from the Contact to the Goodman mine, having repaired it part of the way and constructed the balance. My object was to reach the Goodman mine and work the ledge there, and do general mining work.

I know W. H. Stanley. I have no recollection of ever having had any conversation with Stanley about transferring the lease he had of the Atlantic Consolidated Mining Company to myself. Neither Stanley, Andrew Charles or Muhlbeier ever told me that Andrew Charles had a half interest in that lease. I never had any conversation with any of them about that prior to the transfer. I got the lease from Frank A. Muhlbeier. Prior to the transfer of the interest in the Contact mine to myself I don't think I ever had any conversation with W. H. Stanley about any such transfer. Neither Stanley or Andrew Charles ever told me that Stanley held the Contact mine for the Atlantic Consolidated Mining Company. I never heard and never knew from any source that such was the case prior to the transfer.

Andrew Charles testified falsely right then and there when he testified that the only relations he ever had with me was business propositions and there was no friendships or friendly acts between us. Some years ago

he came to me and asked me to buy the Gold Lead mine on Cedar Hill, and he asked me to bid it off at sheriff's sale for him, which I did. Another time he wanted a contract to clean off the Papoose mill and wanted to get some water from Stevenson, and Stevenson disliked him so much that he didn't want to have anything to do with him, and I was friendly with Stevenson and Charles knew it and he came to me and asked me to see Stevenson, and I did and Stevenson let him have the water. I paid his expenses to go to the Mount Cory mine beyond Hawthorne.

In the construction of this tunnel I let the work out to parties on contract. I told them it was not worth their time to pick out little ore, when it was so small it would not pay to save. I never told Powers to throw pay ore and good ore away. I don't recollect that any of the men ever told me there was pay ore that ought to be saved, but some of them said there was pay ore there in spots. I have been in the tunnel very seldom. I don't know but this man Charles had something to do with representing me when the work was being done; but I generally took their word for it, and if they said they had run 100 feet or more I would pay them. There is a little ore at the mouth of the tunnel now which was saved by the men; I don't know how much there is; I am not a judge of such things.

*Cross-Examination.*

Mr. Douglass testified under cross-examination by Mr. Deal as follows:

I understood before I purchased this interest in the Contact and purchased the lease from Frank A. Muhl-beyer that Stanley had the legal title to the Contact in

his name and also had the lease. I employed Muhlbeyer to buy the Contact and get the assignment of the lease for me. I furnished the money that was paid for it. I employed Mr. Huffaker to draw the papers and to attend to the matter for me.

MR. DOUGLASS subsequently testified as follows:

I am acquainted with the several mining claims traversed by the tunnel in controversy in Silver City. I am the owner of the Goodman mining claim. I first worked on that claim in 1889 or 1890. I first worked in the shaft, and then abandoned the shaft on account of water, finding it inexpedient to work that way, having no machinery to handle the water.

I purchased an interest in the Contact mine in September, 1891. At that time Andrew Charles and I were doing a little work on the Atlantic ground above this lower tunnel—considerably above it; we were working there under a lease; the lowest work we done under the lease was about 70 feet above this lower tunnel. There was no work being done in the lower tunnel when I bought the interest in the Contact; there was a location of the Contact made by a man named Brown, and Brown conveyed to Stanley and Millievich, and Andrew Charles claimed that the Millievich interest in the Contact was for him. Charles may have had some conversation with me about the interest that Stanley held in the Contact claim prior to my purchase of that interest. He may have told me that Stanley owned a one-half interest in the Contact. There was not a word ever said to me about Stanley holding that one-half interest as a trustee or in trust for the



Atlantic Consolidated Mining Company prior to the purchase.

I purchased that interest in the Contact ground for the purpose of running the tunnel from that point to the Goodman mine or ledge, and for the purpose of working the Goodman mine through it, as it could not be worked to any advantage any other way. It was also for the reason that the tunnel was already started in the Contact ground. There was a tunnel there that was badly caved down, and in very bad shape, and it cost nearly as much to clean it out as to run a new tunnel, but that being the nearest point to run to the Goodman mine or ledge, I bought that interest.

I don't think it cost quite as much to put the tunnel in repair as it cost to run a new tunnel, but it might have cost as much; the tunnel was in very bad condition when I took possession of it. There was no track, but we found some pieces of track under the caves, I believe. The timbers were rotten and there was nothing upon which to lay a track, and there was nothing in the tunnel except caves. It was badly caved and all the timbers were rotten and useless and nothing could be used in it. It was of no use in the world to any of the mining claims for the purpose of working them. It could not be used for any purpose whatever, and so far as I could see it was abandoned and it must have been abandoned for many years, judging from the rotten condition of everything we found; what few timbers were left in the tunnel were rotten, and I believe there was no iron; the track had been taken up and the pieces of wood it had been laid on was rotten and could not be used for any purpose.



There was no one there holding possession of this tunnel and there could not have been anyone at work in that tunnel for many years.

In my view, prior to September, 1891, the mining claims on the line of this tunnel as mining properties had no value whatever.

Before I commenced operations there I believe I spoke to Mr. Green about a tunnel they had there, but I understood at that time it was a tunnel upon their own ground and not a tunnel off their ground and on the Contact ground where I found this tunnel.

I might have told Charles before I got the tunnel what I wanted it for and he helped me to get it. I might have said to Charles that I wanted it for the purpose of running a tunnel in that ground, as he owned an interest in the Contact. Charles first worked in the Atlantic ground under a lease I got from Stanley. I don't think he then knew I wanted to drive a tunnel through that ground, as I never talked to him about running a tunnel through there, and I never talked to anyone about what I wanted.

I took the lease of the Atlantic ground for the reason that Charles wanted to work the ground. I didn't want the lease for myself, but I took it myself and told Charles he could have that lease, and work the ground under it.

I went into possession of the Contact ground and the tunnel under the deed from Stanley. I never told James H. Brown in the world that I took possession of the Contact and of the tunnel under the lease of the Atlantic ground from Stanley. I have no knowledge of ever having had any such conversation with Mr. Brown.

During the excavation of the tunnel there was some ore taken out, and it is lying at the mouth of the tunnel now.

unless it has been removed since I was there last. I don't know where it came from in the tunnel; it was little jags of ore that the men encountered in running the tunnel and they thought it might pay to save, and they dumped it to one side of the tunnel at the mouth; I don't think there is over four or five tons of it there, and it came out from pretty well back from the mouth of the tunnel. I don't think we saved or found any ore in the Annie ground at all. However, I was nearly through the Annie ground with the tunnel when Biggs and Charles went ahead of me and made a location of it. They knew I was working in the tunnel in the Annie ground at the time they made their location, because they went into the tunnel in the Annie and found a streak of ore in there, and then they went on the surface and located the ground. I understand that Charles was then interested in the Contact. I believe the record shows he was also an owner in the Annie ground and claimed with Biggs.

I drove the tunnel in the ledge because it was easier to run in the ledge for the men working there than out of it. The men asked me if they could follow the ledge, and I told them if they did not digress too much from a straight course they could, if it was of any advantage to them. I do not believe I could have got anybody to take the contract to run the tunnel at the same figures if they had to run in the country rock.

I have no knowledge of making any demands of Mr. Biggs or of the company for the use of the tunnel; I have no knowledge of it, and I don't believe I did. Mr. Biggs may have sent me a contract for the use of the tunnel to work the Red Jacket, offering \$1800, but I didn't pay any attention to it, because I was running the tunnel and I

didn't want Biggs or anyone else in there to interfere with my men at work in the tunnel, and if he made any such proposition, I paid no attention to it. There was no contract entered into. There may have been some proposition, but I don't remember it now. I think I have got his letters. I will produce them; there was no figures set, I don't want him there because he would be in my way.

I had a conversation with Mr. Bierke, and I told him the tunnel would pass through a corner of a piece of ground he owned—the South End—and I told him when I got through with the work, if he wanted to go in there he was welcome to it.

With regard to the value of the claims through which the tunnel runs, I don't know anything about it, any more than I ran the tunnel through there, and there is a little ledge in there, and that is all I know about it. I would not give \$3000 for all of them. I know that. I do not include the Goodman.

There has been some work done in the Red Jacket while I was running the tunnel, and they have injured my tunnel and piled their dirt on my track and stopped my men from work, and they have done the same thing in the Clinton. The track was not suitable to their cars and they have spread my track, and have made it less useful to me, and they have done all this against my consent and protest.

I don't think it was known that any ledge existed there before I developed it by my tunnel.

The tunnel strikes the Goodman line a little south of the center of the claim.

There was the appearance of a ledge right at the mouth of the tunnel on the Contact ground. It is not a ledge; it is a stringer and in some places it widens out some. I presume this tunnel had followed the ledge the same as I did. In some places we didn't see the ledge. Where the tunnel starts the ledge runs flat like that (illustrating) and I presume you noticed it at the mouth of the tunnel.

The tunnel can do the mining claim through which it passes no possible damage at all; on the contrary, it is a positive advantage to them. It shows a ledge through their claims which they knew nothing about, and never would have known anything about, and it gives them an opportunity to mine their claims.

#### *Cross-Examination.*

Mr. Douglass testified under cross-examination by Mr. Deal:

I don't know that I ever looked particularly over the surface of the Annie and Clinton mining claims for the purpose of ascertaining whether or not there was any outcrop of a vein on either of them. I have been over the surface a good deal and never saw any. I don't think there is any outcrop on the Annie. I have been over the ground a good deal and looked around, and never saw any ledge there.

I never made any agreement with Mr. Bierke that the owners of the South End claim may use that tunnel from its mouth to the South End and work it without compensation to be paid to me for the privilege of using the tunnel for that purpose. I told him this; if we found any ore there and he wanted to go in and work it, he could go in

there and put his men in there and take the ore out, and there was no agreement particularly about it.

Q. What I want to know of you is whether or not when this matter is ended, the owners of the South End shall have the right to work their claim through the tunnel without compensation?

A. Yes, if he wants to, but he must keep out of my way, as I said before, and not interfere with my men working there.

A. I want to read to you a portion of the contract introduced in evidence here—the contract that you made with the men for running this tunnel: “Said tunnel to be of the following dimensions, to-wit: four feet width at the bottom, three and a half feet at the top, and six feet in the clear, and to be run on the course of the vein.” I will ask you if in every contract that you made with men to run that tunnel, if such contracts called for the running of the tunnel on the course of the vein?

A. Yes, probably.

The ore saved at the mouth of the tunnel was separated from the waste; it was such ore as the men thought best to save and they separated it from the waste and saved it.

When I referred to work done on the Atlantic ground I meant the patented mining claim which is laid here upon the map as belonging to the Atlantic Consolidated Mining Company, as I understood it, and I speak of working upon that ground under the lease introduced in evidence here. At the time I was working there I was working as an equal partner with Andrew Charles. I was at the same time an equal owner with Andrew Charles in the Contact ground, I owning one-half and somebody else owning one-



half. I don't know whether I had quit working on the Atlantic before I started on the tunnel or not. I was doing the work on the Contact, and Charles never paid a dollar towards it, and he had no interest in the tunnel at all.

When the tunnel was being extended I asked Charles to measure the work for me, he being there and occupying my house. He was there to do the measuring only. He got no pay whatever, only what ore he got his son to hook out from the vein.

The total expense for the work done and material used in cleaning the old tunnel exceeded \$1000, but I cannot say how much until I look. Perhaps I had contracts to have the work done for 40 cents a foot, but I don't know. I don't know the largest price I paid for work done in cleaning and repairing the old tunnel. I furnished everything except the work under the contracts.

Biggs never paid a cent towards repairing or cleaning the old tunnel. I paid every expense for that alone.

Being subsequently recalled MR. DOUGLASS testified:

The young man who works in my office has since I testified gone over my books to ascertain the cost of repairing the tunnel in controversy. This report (showing) represents the expenditures in repairing the old tunnel. There is nothing in that report for new work done in the tunnel, and some of the items are rather under than over. If there is any difference at all, the cost of repairing the old part of the tunnel was rather over this itemized account.

When the work of running the tunnel was going on Andrew Charles did not represent me in any capacity whatever. He was there living in a house that I owned,



and I asked him when the men had gone a certain distance and they wanted their pay to see that it was correct, and that is all he had anything to do about it, just to measure the tunnel and see that it was correct, and the men would get their money for the distance they had run. He was not under my employ or under my pay at all. I understood he was secretly interested in the contract of extending the tunnel, but I knew nothing about it at the time. I have so understood since.

*Cross-Examination.*

Under cross-examination by Mr. Deal, Mr. Douglass testified as follows:

In this itemized statement there is a charge for recording location notice; that had nothing to do with the cost of repairing the old tunnel. There is a charge of \$20 for surveying I had done there. There is \$30 for the suit of Powers; I paid him \$233 and he took a notion he would get more money and he tried it on, but he didn't get it, and I had to pay the cost of suit, because he had nothing. There is the charge of laying air and drain pipe of \$296.20, and that was not for the old tunnel; \$137 for making upraise was an upraise in the old tunnel, and it was for an air connection, and the air pipe came all the way down this upraise. I presume those charges are correct, as my clerk knows as much about it as I do and I told him to put down nothing except for costs of repairing the old tunnel, and I presume all those charges are for material used in the old tunnel. There is charges for teams to mine, which was for teams to haul lumber and material and air pipe. I don't remember any man named Hendricks working in the old tunnel; Mullally worked in the old tunnel

and Brown. The other item of \$20 for surveying may have been in connection with the upraise. \$5 for repairing road was to put the road in condition to get material there. The charge for the bellows was to sharpen tools. The bellows are there yet, and the other parties use them a good deal, too. 43,000 old shingles was used on the buildings there. H. and R. stand for Hayes and Raphaelovich.

*Petitioner's Exhibit No. 1 before Second Commission.*

Team to mine . . . . .	\$ 3 00
Tools . . . . .	7 75
W. H. & Co., nails and candles . . . . .	6 90
At times team to go to mine . . . . .	8 50
Track iron . . . . .	41 00
Nails and oil . . . . .	9 00
W. H. & Co., nails . . . . .	5 75
D. Crosby, nails . . . . .	2 80
Track iron . . . . .	9 68
Paid Hayes and Raphaelovich on contract . . . . .	45 00
Nails . . . . .	1 00
Paid H. & R. on contract . . . . .	30 00
Horse and buggy . . . . .	3 00
Candles . . . . .	2 40
Files . . . . .	50
Teams to mine . . . . .	8 00
W. H. & Co., supplies . . . . .	3 60
Charcoal . . . . .	4 50
Lumber . . . . .	163 69
Paid H. & R. balance on contract . . . . .	105 00
Team to mine . . . . .	2 00

Nails .....	\$ 1 00
Teams to mine .....	2 00
Powder .....	2 50
Oil .....	1 00
Naighley & Bowman .....	62 60
Supplies .....	7 50
Candles .....	4 95
Candles .....	9 60
Nails .....	2 40
Livery .....	2 50
Hendrix, labor .....	32 00
Surveying .....	15 00
Neighley, labor .....	48 00
Lumber .....	142 55
.....	64 70
Mullaly and Brown on contract .....	202 00
Nails, supplies, .....	2 50
Livery .....	2 50
Livery .....	2 50
Supplies .....	5 50
Cummings on contract .....	115 50
Neighley, labor .....	75 00
W. H. & Co., supplies .....	13 98
Neighley, labor .....	21 00
Surveying .....	20 00
Supplies .....	1 75
Lumber .....	127 45
Supplies .....	1 60
Labor on road .....	5 00
Livery .....	2 50
Supplies .....	13 00

Supplies, bellows.....	\$ 10 00
Livery .....	2 50
Supplies .....	9 70
Supplies, nails .....	1 40
Supplies, lumber .....	28 10
Supplies, fuse and steel .....	6 60
Livery .....	2 50
Cummings, making upraise.....	157 00
Supplies, copper wire .....	1 90
Supplies W. H. & Co .....	35 10
Powers, timbering tunnel .....	255 00
Laying air and drain pipe .....	84 80
Air and drain pipe .....	296 20
Powers, cleaning tunnel .....	72 00
Case vs. Powers .....	30 60
Surveying .....	23 00
Recording location notice .....	2 50
House and putting up same .....	222 60
4300 old shingles .....	12 00
Old lumber .....	100 00
	\$2837 15

Lumber and old iron of which no account was taken.

Yet there is a portion of the old tunnel that is much too low and will have to raise it from one to two feet before it will be in condition to work through conveniently.

[Endorsed]: J. M. Douglass et al. vs. James D. Byrnes et al. Statement of Expenses on old Tunnel. Petitioner's Exhibit No. 1.

Mr. Douglass' testimony given in the State Court in the case already referred to was also introduced in evidence:

I was one of the defendants in this action and the assignee of the lease from Muhlbeyer and the grantee of his deed, both introduced in evidence. Under the lease I furnished Andrew Charles a man or two to work in the upper workings of the Atlantic. Charles never worked in the lower workings at all; that has nothing to do with the lower workings at all; it is a different affair. Charles never worked in the lower tunnel since I got that ground. I never had possession of the lower tunnel until after Muhlbeyer made his deed to me and assigned the lease, and I never had possession of the Contact until after that time.

I did not take possession of the lower tunnel under the lease. I took possession of the Contact mine and of the lower tunnel under the purchase from Stanley. The lower tunnel had nothing to do with the lease of the Atlantic Consolidated. The lease was for the Atlantic Consolidated ground, and I took possession of the Contact mine and of the lower tunnel under a purchase from the owner.

The same man who owned the lease of the Atlantic ground owned also the Contact mine. I bought the Contact mine because the mouth of the lower tunnel was on the Contact ground.

*Cross-Examination.*

Mr. Douglass testified as follows under cross-examination by Mr. Huffaker:

The tunnel could not be used at all without being first repaired and put in working condition and I did that.

I make no claim whatever to the Atlantic ground; all I want is to pass my tunnel through it.

Under this conveyance of the Contact I bought for myself and for nobody else, and I went into possession of the Contact mine for myself and nobody else. I never went into possession of the Contact mine under the lease which has been introduced in evidence; the lease had nothing to do with the tunnel. The tunnel does not belong to the lease and has nothing to do with it. I bought the Atlantic claim and I leased the Atlantic Consolidated claim. I claim the Contact under the deed from Muhlbeier, which he got from Stanley, and which Stanley got from the locator, Brown, and nothing else.

*Examination by Mr. Deal.*

Q. Before you made the purchase from Muhlbeier of the Contact, you had the title examined? A. No, sir.

Q. Didn't you ascertain before you made the purchase that Brown had located the Contact claim?

A. Yes, I understood so.

Q. You had your attorney, Mr. Huffaker, do it?

A. I don't know whether he did or not. I suppose he did.

Q. You knew that Brown had conveyed to Stanley?

A. Yes, sir.

Q. You knew when Muhlbeier bought the Contact ground from Stanley that he also bought at the same time the lease which Stanley had from the Atlantic Company?

A. Yes, he got both at the same time.

When I got this lease I did not know who had run the lower tunnel. I did not take possession of the lower tunnel until after I got the lease. The lease came with the



conveyance. I think Mr. Huffaker drew all the papers at the same time.

MR. DOUGLASS testified as follows in rebuttal:

I don't remember the contract price for repairing the tunnel. It was more than three bits a foot; they were to clean the tunnel out.

*Examination by Mr. Huffaker.*

I may have told Mr. Byrnes in my office that I held the Atlantic Consolidated ground under the lease, but the lease had no reference to the Contact ground, nor of the tunnel.

*Examination by Mr. Deal.*

It was Charles' representations that induced me to buy this Contact ground and to take that lease of the Atlantic Consolidated Mining Company's property. I took the lease more for his benefit than for mine. I did not want it myself; it was no use to me. At the time I took the lease and bought the Contact I had an idea of extending the tunnel.

Q. You knew that the tunnel and the Atlantic Consolidated ground were both owned by the same parties?

A. I knew the Contact was not owned by them.

Q. You knew that Stanley had a lease there, and that Stanley and Millievich had a lease, and that Andrew Charles was a secret partner in the lease—that Millievich had the lease for Andrew Charles?

A. Yes, I think so. I say, I think so. I think Charles told me he was a secret partner with Stanley in the lease, and that Millievich held the title for him.

I wrote to Green about the tunnel as I supposed when I

wrote to him that the tunnel was on the Atlantic ground; I did not know where the tunnel was. I did not write to him after I bought the Contact ground. I did not write to Green as an officer of the Atlantic Consolidated Mining Company looking to him to get the right of way for the tunnel. I had not seen the tunnel at the time. I wrote to him about a tunnel on the Atlantic ground; but I afterwards found that the tunnel I wrote to him about was not on the Atlantic ground. I know now the tunnel I wrote to Green about was this tunnel in dispute, but I didn't know where the tunnel was then, and the only object I had in paying a half interest was for the privilege of going through there. I understood from Mr. Green that he was an officer of the Company and that he was an owner in that ground.

*Examination by Mr. Huffaker.*

After writing to Green I discovered the tunnel I wanted was not on the Atlantic ground, but was on ground owned by other parties. The reason I purchased the Contact ground was to extend that tunnel to the Goodman mine.

By MR. DEAL:

I took the deed for the Contact mine for my own benefit. It was for the purpose of getting possession of the tunnel that started in the Contact ground.

Q. C. J. Millievich, who held a half interest in the Contact claim, held that half interest for the benefit of Andrew Charles, also?

A. Yes, I think so; I say I think so. Charles had a half interest in the Contact mine under cover; the way he generally does his business—under cover.

W. H. STANLEY, called upon the part of the defendants, testified as follows:

I am the lessee named in the lease introduced in evidence from the Atlantic Consolidated Mining Company to W. H. Stanley. Andrew Charles and I owned equal interests in the lease. I think Joseph M. Douglass, the petitioner in this suit, knew of the fact that Andrew Charles had an equal interest with me in that lease prior to the time I assigned that lease to Frank A. Muhlbeier. I informed him of the fact before the assignment was made. Andrew Charles was an equal partner with me in that lease at the time I made the assignment of it to Frank A. Muhlbeier. I informed Mr. Douglass of that fact before I made the assignment. Mr. Huffaker drew all the papers with regard to that assignment. When the papers were drawn Andrew Charles was an equal partner with me. At the time of the assignment of this lease to Muhlbeier I informed Mr. Huffaker that I only owned one-half of that lease, and that Andrew Charles owned the other half. I informed him of the same fact at the time of the conveyance of the Contact. I expressed a doubt of my right to convey the Contact claim at all, and Mr. Huffaker said I could convey it, and that he would stand between me and harm in that respect and so I conveyed.

The ground that I bought from Brown was originally known as the Cadiz, and it was originally claimed by the Atlantic Consolidated Mining Company, and Brown jumped the ground. Then, as I had a lease of the property, and wished to work it through this tunnel, I purchased the Contact ground from Brown, so as to avoid all

trouble, as I intended to work under my lease through this lower tunnel, the mouth of which is located on the Contact ground. I bought the Contact ground in order to enjoy the benefit of my lease from the Atlantic Consolidated Mining Company. I thought it was necessary to have the lower tunnel.

The conveyance of the Contact and the assignment of the lease by me to Muhlbeier was all one and the same transaction. It was drawn at the same time and upon the same consideration, and all between the same parties to the transaction. Muhlbeier was there at the time; he heard the conversation with regard to the ownership of the claim, and he heard the doubts I expressed with regard to my right to convey the Contact, being present. Muhlbeier represented to me that he wished to work the Atlantic ground under the lease I held, and under the same conditions, and I told him what the conditions were and that the company was anxious to prosecute the work, and he bought the assignment from me with that understanding.

I cannot say that I claimed any interest in the Contact adversely to the Atlantic Consolidated Mining Company, because in making the conveyance I expressed a doubt that I had any right to make it.

#### *Cross-Examination.*

Under cross-examination by Mr. Huffaker, Mr. Stanley testified as follows:

Q. When these transfers were made, did you not ask me if you could assign that lease under the conditions expressed in the lease?

A. I expressed a doubt whether I had the right to convey all those documents, as a whole, as I understood it.

Q. And when I read that lease over, I told you you could assign that lease if you wished to, and that no one could take advantage of the lease, except that the Atlantic Consolidated Mining Company could repudiate it?

A. Yes, you said I had the right to assign it.

By MR. DEAL:

Q. Didn't you ask Mr. Huffaker whether you had the right to make a deed of the Contact mining claim to Muhl-beyer?

A. I believe I asked if I had the right to transfer it as a whole.

By MR. HUFFAKER:

Q. There was nothing said about tenancy or anything of that kind?

A. That had reference to the whole and one transaction that I expressed a doubt about.

The following testimony given by Mr. Stanley in the State Court in the case hitherto referred to was introduced in evidence:

I am the lessee named in the lease which has been introduced in evidence in this case. Under that lease I took possession of the ground and of the tunnels—there were three tunnels leased with the ground. I got the Atlantic and the Cadiz ground. That was in the spring of 1890. The Atlantic Consolidated Mining Company called a meeting and they authorized the trustees to give me a lease of the property, and they executed and delivered to me a lease under authority of the board of trustees, and I

took possession of that property under that, under the lease that you introduced in evidence. I assigned it afterwards to Frank A. Muhlbeier. I took possession of the lower tunnel under the lease which I had of the Atlantic ground and its appurtenances. The first thing I did after getting the lease, I took possession of the lower tunnel—the tunnel in controversy here, as I expected to do the greatest part of my work through that tunnel. I went into the tunnel several hundred feet and went to where it was badly caved, and I crawled over the cave easily, and got into the patented ground of the Atlantic Company; I got well into the patented ground. This long tunnel passed entirely through the Cadiz, and went into the patented ground, but how far I could not tell. Then there was a shaft about 300 feet in from the mouth of the tunnel that was sunk from a cross drift a short distance from the tunnel, and I went down that shaft and found that was badly caved also. I removed some ladders that were down that shaft; that was in fact the first work I did under the lease. After that I did some work on two other tunnels on the property.

When I got the lease which has been introduced in evidence, there was a mine called the Cadiz, which was part of the ground leased to me by the Atlantic Consolidated Mining Company. They gave me a map of the property leased to me, and this map included the Cadiz ground as part of the lease.

Q. When you took this lease from the Company, did you ascertain whether anybody was claiming this ground in front of the tunnel and where the mouth of the tunnel is?



A. Yes, when I went there to take possession and work under my lease, I thought I would have trouble with Brown, and to remove him, I simply bought him out for myself and for Mr. Millievich, a merchant of Virginia City. I don't know who he represented.

Then Muhlbeier came to me and represented to me he wanted to work that ground under that lease. I delivered possession to Muhlbeier according to the terms of the assignment. I went before Mr. Huffaker, and I expressed some doubt to him whether I could assign that lease, and he assured me that I could, and I accordingly made the assignment to Muhlbeier. I put Muhlbeier into possession of the very same property. He said he wanted to work it and I said he should pay the royalty and conform to the terms of the lease, and he stepped into my shoes so far as that lease was concerned.

After Douglass got the assignment and the conveyance from Muhlbeier he operated the mine and extracted ore and extended the lower tunnel beyond the point where I penetrated it.

At the time I got the lease the lower tunnel cut a lode or vein of quartz in the Atlantic ground. I am a miner and I know a lode or vein of quartz bearing gold and silver when I see it. I know there was a vein shown and exposed by that tunnel, in the Atlantic Consolidated ground at the time I went into the tunnel under the lease. Andrew Charles had a lease of that property before, and he went in the tunnel with me and showed me where he had put timbers in, and where ore had been taken out and that is exactly where I expected to do my work under the lease from the company.

No one attempted to do any work there outside of myself until after I assigned the lease.

Upon being recalled, MR. STANLEY testified as follows:

The tunnel when I went there under the lease had been driven 200 feet in hard blasting rock and for that distance it had not been caved any. Beyond that it was caved slightly. The most of the caved ground was about 300 feet in, and then I could go about 50 feet in the caved ground. There was no trouble in reaching the Atlantic ground through that tunnel; I could walk in readily a distance of 300 feet. For a distance of 300 feet the cost of repairing the tunnel would be to lay down the track, and that would be about \$100. If there had been no tunnel there it would have cost seven dollars a foot to run that tunnel, and at the time it was run it cost more than that, as everything was higher.

*Cross-Examination.*

On cross-examination MR. STANLEY testified:

I think the cave was near the Atlantic line—passed the line, in the Atlantic ground. To work the Atlantic ground you would have to remove the cave. You could work it at the edge of the cave as the lode dipped easterly. No mining man could have gone in that tunnel for the purpose of working the Atlantic ground without first repairing the tunnel.

JAMES D. BYRNES, called upon the part of the defendants, being first duly sworn, testified as follows:

I am one of the plaintiffs in this action. I went with

the sheriff of Lyon county upon the Atlantic Consolidated Mining Company's ground to take possession in February, 1893, before I commenced suit in the District Court, Storey county, against J. M. Douglass. At that time I had the deed from the sheriff of the property. The sheriff of Lyon county put me in possession of the ground upon the surface. I went to the upper and to the lower tunnel. I was refused possession of the lower tunnel by Douglass' men. After the men refused to let me take possession of the lower tunnel, I came to Virginia City to see Douglass, and he refused my right to go into the tunnel, and he also showed me a lease that he had from Stanley, and he said he went into possession of that tunnel under the lease. He had his nephew bring out the lease, and he showed it to me. I informed him I was the owner of that property at that time.

I went up on the mine and the sheriff put me in possession. I first went to the upper tunnel and that tunnel was locked, and then I came to the lower tunnel, and the men there said I had no right to go there, and then I came to Virginia City and went to see Douglass, and I went to his office and spoke to him, and I told him that I was the owner of the Atlantic tunnel; I told him that myself and James J. Green, deceased, were the owners of the tunnel, and I spoke to him about the lease under which Stanley went to work in the tunnel, and he got his nephew to go in and bring out the lease, and he showed me the lease, and then we had a couple of words, and he said he would be damned if I had any rights there, and I said I would get it if there was any law left, and that was about all there was about it. He said I had no rights there. That was the cause of this suit.

*Cross-Examination.*

MR. BYRNES testified as follows, under cross-examination by Mr. Huffaker:

Q. Douglass did not say that he went into possession of that tunnel under that lease, did he?

A. That was a portion of the talk——

Q. You do not answer my question. Did Douglass tell you that he went into possession of that tunnel under that lease?

A. He said he had a lease of the tunnel under Stanley, and he showed me the lease.

Q. But he did not say that he went into possession under the lease?

A. Yes, I think he did; I could not repeat the words he used, but it was something to that effect.

Q. Didn't the sheriff tell you when you asked him to give you possession of the lower tunnel, that he did not sell that tunnel? A. Yes, he made that remark.

Q. And the sheriff did not go to the lower tunnel with you? A. No, he went to the upper tunnel with me.

*Examination by Mr. Deal.*

I paid about \$5000 or \$7000 to make the tunnel, and I paid Judge Blackburn as watchman of the property, including the tunnel, for two years, and I paid a judgment of over \$700 that he recovered in this court from the company. I was a stockholder of the company. Blackburn got about \$800 for watching the property, and the title that I bought and under which the sheriff of Lyon county put me in possession was for the sale of the property under that judgment. I was a stockholder and officer

of the company at the time, and as such officer I know the facts to which I have testified.

*Under Examination by Mr. Huffaker.*

I don't know when this tunnel was started, and I don't know how far it had been run before I got it, but it had been run some distance by somebody before I expended any money on it prior to my time.

JAMES D. BYRNES testified as follows in rebuttal:

There was no action on the part of the board of directors of the Atlantic Consolidated Mining Company indicating that they ever intended to abandon that tunnel or any part of their property. I know that property to-day, and that tunnel is the principal thing that makes it valuable. By means of that tunnel we can reach and work the lower workings of our mine, and that is what we expect to do; I came here with the intention and for the purpose of having work done there through the tunnel. The country there rises steep; I know of no way that we can work that mine profitably except through the tunnel.

J. D. BLACKBURN testified upon the part of the plaintiff: I was the plaintiff in the suit of J. D. Blackburn against the Atlantic Consolidated Mining Company, which was tried in the district court of the State of Nevada, first judicial district, Storey county, and recovered judgment for the amount claimed. Between October 28, 1887, and September 1st, 1890, I performed certain services for the Atlantic Consolidated Mining Company, as watchman, taking care of their property. The company had run the lower tunnel. Bob Buzan worked in it in 1875. When I

saw Buzan working there the tunnel had been run a distance of over three hundred feet, and he run it along a distance until he cut the ledge. It was the same named company that I was watchman for that run the tunnel, but different men became interested in it. The parties I worked for as watchman became possessed of the lower tunnel as successors in interest of the parties who run the tunnel. When I went there as watchman the first day of February, 1887, I took possession of the lower tunnel and their other property, until I commenced suit against them for my wages the 2d day of September, 1890. I worked for them as foreman and superintendent at first and worked in that capacity until they closed the mine, and then I was left in charge as watchman. I remained as watchman until September 2d, 1890.

*Cross-Examination.*

On cross-examination, Mr. Blackburn testified: I didn't do any work as watchman. It was some years prior to 1890 that work had been done on the Cadiz ground. I think when Brown located the Cadiz ground in 1890, that it was vacant ground subject to relocation by reason of the fact that no work had been done for several years. The tunnel was a good tunnel for about 430 feet, in 1890. I measured it to the point where it was caved at that time with Brown. The tunnel was run about 300 feet when I went to Silver City in 1872. I understood it had been run by the Atlantic company. One of the original locators of the ground told me the company run it. It was about 1882 when the corporation last done any work on the tunnel.



*Redirect Examination.*

On redirect examination witness testified: The company during that time was doing other work through other tunnels. I helped to run them myself. They spent lots of money. Uhl, their superintendent, worked the Atlantic Con. claim through other tunnels, and he did some work in the lower tunnel too. I never knew anybody except the Atlantic Consolidated Mining Company ever claiming the lower tunnel, until Mr. Douglass claimed it in this suit. It was J. M. McGinnis and R. C. Buzan who worked in that lower tunnel.

THEODORE VINCENT was called by plaintiff and testified as follows: I have resided in Silver City for twenty years and have been engaged in mining a portion of that time in the vicinity of the Atlantic Consolidated Mining Company's claim in Devil's Gate and Chinatown Mining District, and I know the tunnel which has been testified to by J. M. Douglass and other witnesses. I understand what is in dispute in this case. I never was in the tunnel twenty feet in all my life. The tunnel was run a certain distance when I came there. I have seen people working there in that tunnel apparently taking out rock and doing mining work. I saw John Yule, the superintendent, and a man named McGinnis working there. I saw Yule there at work in 1878, and again later on in 1886 or 1887. I got acquainted with him in 1878. I was at work above there taking out rock and Yule told me he was running the tunnel for the Atlantic Consolidated Mining Company. Mr. Vincent testified under cross-examination:

The last work I saw done in that lower tunnel was in 1880.

E. T. POWERS was called by plaintiff and testified as follows: I reside in Silver City. Have been mining for five or six years. I know the Atlantic Consolidated Mining Company's tunnel, and have passed there several times within the last fifteen years. I was in that tunnel when Douglass had men in there laying the track. I was in the tunnel two or three hundred feet before they laid the track. I was there when a man named Duncan had a contract to clean the tunnel out, and he said he had 30 cents a foot to clean the tunnel out and put the track in. I went in the tunnel about 250 feet, I think. The men had started to put the track on the outside of the tunnel, and they put a bridge across the creek for that purpose. I have worked ten months in that tunnel since. Mr. Douglass told me it cost four dollars a foot to run the tunnel in solid ground. This man had 30 cents a foot to lay the track, and it couldn't cost much money to extend the track to where the tunnel was pushed ahead, or where it cut ore, maybe not a hundred dollars. I include the laying of the track. They did not cut the tunnel any deeper to lay the track and they did not dig a drain; they merely raised the track up. I think that for two or three hundred feet of the tunnel the tunnel could be repaired and the track laid for \$100. I think the highest price it cost them to clean out the tunnel and lay the track was \$2 a foot, where they done some timbering, and they struck an open space in the tunnel of about one hundred feet, too.

*Cross-Examination.*

On cross-examination, witness testified: The first 250 feet I speak of is from the mouth of the tunnel. That brought the end to about the line of the Atlantic ground, I didn't go beyond that point in. I don't know how the tunnel was beyond that point in.

*Redirect Examination.*

On redirect examination, witness testified:

I think where the cave was is where the ledge of the Atlantic is. I could have crawled over the first cave, but I didn't do it, but I know there was a ledge there, as I could see quartz.

J. F. ANGELL was called by defendants and testified as follows:

I have lived thirty-three years in Silver City. I know the tunnel in controversy and the ground called the Contact mine, and have known it since the fall of 1860 or 1861. I don't know who started the tunnel or when it was started. I know a man named McGinnis and Robert Buzan commenced work there in 1865, and run a tunnel there for water. They worked there in 1865 and 1866 to my knowledge. Buzan left there in 1872 or 1873, and McGinnis left there about twelve years ago. The last work I saw done there I think was when Matt. Canavan in 1887 had a fellow named Akey work awhile there, and Canavan went to secure the tunnel and put timbers in there. I think Yule came there in 1878 to work. He worked in the tunnel and worked in the shaft that was sunk in 1861, and he got hurt and went away and came back in 1878, I think.

The shaft stood up the ravine three or four hundred feet from the mouth of the tunnel. It was situated on the Atlantic ground. They got water in that shaft in 1871, and quit. I don't think Yule done anything in the old tunnel in 1887. Yule came up there about that time and stopped around there a week or ten days and then he went below and came back and went to work running a new tunnel. He said when he came back that his business below was to consult the company about its being better to run a new tunnel than to clean out the old one, and when he came back he went to work running a new tunnel and did not work in the old tunnel. I never saw any work done in the old tunnel after the time Matt. Canavan put men to work in there to secure the ground in 1877. They secured a point of ground about 200 feet in from the mouth of the tunnel. The tunnel was in a very bad condition. Canavan said it was a wonder the fellow didn't get buried up.

#### *Cross-Examination.*

On cross-examination Mr. Angell testified: Canavan and I went into this water tunnel where Naighlaigh was at work. I suppose Canavan had that work done for the Atlantic Consolidated Mining Company to prevent the tunnel from caving. I knew from what Canavan told me that he had the work done for the company and that he was having the work done to prevent the tunnel from caving. Yule did not tell me the company was going to abandon the old tunnel. The men I knew at work in the tunnel in 1865 and 1866, were J. M. McGinnis and R. C. Buzan. I heard they sold what was known at that time as the Pacific lode. I don't know who to.

J. B. McJILTON, called by defendants testified as follows: I have resided at Silver City off and on since 1875. I know the tunnel in controversy on the Contact mining ground, and have known it since 1876. I was acquainted with Charles Aitken that worked there in 1876. I don't know when it was run or how far. Aitken worked there in 1876, and he must have been there in 1878, and John Yule must have been there in 1878, and the last work that was done there was in 1881, and the next work I know being done there was in 1887. I don't know how long they worked in the lower tunnel, but they left the lower tunnel and went above on the Atlantic Consolidated ground and they started a tunnel just about the middle of the claim, and they run the tunnel in about 400 feet, I should judge. They were working there in 1887 and 1888. I don't know that they worked much in 1888. In 1889 and 1890, and I believe a big portion of 1891, I believe that place was vacant, and there was nobody working there. I was working on the ground above during that time myself, and there was nobody working below there. I understood the lower tunnel was caved in 1890 and 1891, and I have been quite a distance on the cave; it was not caved to any extent, and it would be cheaper to clean it out than to run a new tunnel. As far as I saw it, it would be cheaper.

*Cross-Examination.*

On cross-examination, Mr. McJilton testified: I understood when Aitken was working there that he was working for the Atlantic Consolidated Company, a California corporation. When Yule worked there he was working



for the same company as superintendent. I have never heard of any one claiming that lower tunnel except the Atlantic Consolidated Mining Company until Mr. Douglass claimed it in this suit. He is claiming a tunnel that was already run more than three or four hundred feet to my knowledge. Part of the way it is in solid rock. During the time that I said nobody was doing any work in that tunnel I knew that Judge Blackburn was there. I don't mean to say by abandoned that the company had thrown up its rights to any part of their property. All the persons I saw working there, I believe they were working for the corporation. On redirect examination: The work I saw Yule doing was in the upper tunnel on the Atlantic patented claim.

*Recross-Examination.*

On recross-examination: I would not say that Yule, as superintendent of the Atlantic Consolidated Mining Company, did not do any work for the company in the lower tunnel. I simply say I don't know whether he did or not and that he did most of his work through the new tunnel. He might have done some work through the lower tunnel.

On being recalled by defendant, witness testified as follows: I have known the lower tunnel since 1876. I helped to take the timbers out of the lower tunnel late in the fall of 1889. Judge Blackburn had charge of the Atlantic Consolidated mine at that time. I understood he had charge of it for the Atlantic Consolidated Mining Company. I took the timbers out at his suggestion. I did not take the timbers out of the tunnel; it was out of



the shaft I took the timbers out of; the timbers extended from the top to the bottom of the shaft. The shaft is situated on the Cadiz ground in that ravine close to the east boundary of the Atlantic Company's ground. It is just above the lower tunnel. I think there is a connection made between the shaft and the lower tunnel. I don't know who took the track and timbers out of the lower tunnel.

J. M. DOUGLASS testified as follows before the commissioners, being called by defendants: I am the petitioner in this proceeding. I have a contract to construct the tunnel right in question in this matter of the size of the right of way described in my petition,  $7\frac{1}{2}$  feet square, but it was not constructed the same size as called for. I made the contract or agreement to construct the tunnel  $7\frac{1}{2}$  feet square. It is in writing. (Contract produced.) This is the only contract I have that I know of; the others are all destroyed. The contracts were not completed, but I accepted them. The contract is offered in evidence by Mr. Deal for the purpose of showing the use that is to be made of the tunnel by the petitioner, the purpose for which it is constructed and also the size of the tunnel. The contract provides that "the said first party hereby agrees with and binds himself unto said second party, to dig, excavate, construct and extend said tunnel the distance of five hundred feet from the present face, said extended tunnel to be of the following dimensions, to-wit: Four feet in width at the bottom, three and one-half feet in width at the top, and six feet in the clear in height, and to be run on the course of the vein, and as near thereto as practicable." That was the size of the tunnel to be constructed,

I suppose. The face of the tunnel was not up to the Goodman ground when this contract was made. The contract is dated July 12, 1893. I seldom go there and don't know where the face of the tunnel was when it was commenced. Powers commenced at some point where other persons that I had contracted with had left off. I made this contract with Powers. I had contracts with other persons who extended the tunnel, and I presume the contracts are all for the same dimensions of tunnel as this contract calls for. If I want to, I will construct a tunnel there  $7\frac{1}{2}$  feet square for a right of way. As to the size of the tunnel I intend to construct I place that matter entirely upon my own desires and inclinations.

The following question was asked witness: "Q. In case you extend that tunnel into and through the Goodman ground and find a body of ore, have you any intention of increasing the size of the tunnel? A. That is something I can't tell you; if I do, it is my business, and not yours." I will do whatever I think is to my interest to do. I am not running that tunnel for the benefit of anybody else, unless you want to pay for it, or a part of it. "Q. Have you any intention, or have you ever had any purpose of permitting any of the defendants in this action to make use of any part of the tunnel from its mouth to the Goodman ground? A. If they pay for it; I say, if they pay for it." I have no desire or any intention whatever to permit any of the defendants to use any part of this tunnel, even through their own ground, unless they pay for it—unless they pay me for the use of it. It is my intention to charge them a very moderate price if they desire to use the tunnel. I do not propose that they shall fix the terms unless the same is agreeable to me. That

tunnel has cost me over eight thousand dollars. I regard that tunnel from its mouth to the Goodman and through the Goodman as my own private property, without any right of anybody in it, and I propose to charge what is right that the defendants shall pay for the use of the tunnel, and no more. So far as I am concerned and the Goodman Mining Company, my purpose in securing a right of way by these proceedings is to have the tunnel for own use and benefit. No one else can use it without my consent. They can use it by paying me a just sum. I don't want any more and I would not have it from any of them.

Second. The decision of said circuit court confirming said report and denying said motion for new trial was erroneous in that the commissioners in their report found and decided that H. C. Biggs and Maggie Lee McMillan are the owners each of an undivided one-fourth interest in the Contact claim and mine and the tunnel therein, being 299 feet of said tunnel from the mouth thereof to the west boundary line of the Contact claim, and said commissioners did not award to said H. C. Biggs and Maggie Lee McMillan, or either of them, any compensation whatever for said tunnel through the Contact claim, or for said right of way through said Contact claim.

Third. The decision of said circuit court confirming said report and denying said motion for a new trial is erroneous in that the commissioners in their report decided and found that H. C. Biggs and Maggie Lee McMillan are the owners of the Annie and Clinton mines, and that The Red Jacket Consolidated Mining Company is the owner of the Red Jacket mine, and that the petitioners are en-

titled to the right of way for the tunnel mentioned in the amended petition through each of said mines, and no compensation whatever is awarded the said owners of said mining claims or either of them for said right of way.

Fourth. The said decision of said circuit court in confirming said report and denying said motion for new trial is erroneous in that the completed tunnel through said Contact claim from the mouth of said tunnel to the western boundary line of said Contact mine, a distance of 299 feet, was worth at the very least \$2990 and it would have cost the plaintiff at least \$2990 to construct such a tunnel to the west line of said Contact claim, and yet said commissioners did not award any compensation to the owners of said tunnel for said tunnel, or the right of way through said Contact claim.

Under the specifications, defendants refer to the testimony and evidence set forth under the first specification of error, and further show that upon the hearing the following testimony was given by witnesses who were duly sworn:

R. LAMB testified that he was a miner, and had long experience as a miner, that it would cost \$3000 to run the first 250 feet of the tunnel, and \$1600 to run the rest of the tunnel.

E. T. POWERS testified that he was a miner of long experience and that it would cost \$3500 to run the first 350 feet of the tunnel, and \$1500 to run the rest of the tunnel.

Fifth. The said decision of said circuit court in confirming said report and denying said motion for a new trial is erroneous in that the tunnel through said Atlantic

Consolidated mine and into the Annie ground already constructed by the owners of the Atlantic Consolidated mining claim and their predecessors in interest and grantors, the same being 394 feet in length, was worth \$2000 and it would have cost plaintiff \$2000 to construct the same; yet the commissioners awarded James D. Byrnes and Edward Mulville \$1021.95.

Under this specification defendants refer to the testimony hereinbefore set forth, and to the report of said commissioners.

Sixth. The said decision of the circuit court in confirming said report and denying said motion for new trial is erroneous in that no compensation is awarded by the commissioners for the damage sustained by the defendants, H. C. Biggs, Maggie Lee McMillan and Red Jacket Consolidated Mining Company, by the wrongful acts of plaintiff, J. M. Douglass, in running the tunnel through the ledge in the right of way condemned, through the Annie, Clinton and Red Jacket mines, and in taking out the ore excavated in running the tunnel, and throwing it away instead of saving it for the owners thereof.

The evidence showed that immediately after these proceedings commenced, plaintiff, J. M. Douglass, under an order of court made in the case under the statute took possession of the right of way described in the amended petition, and run a tunnel upon the ledge, through the Annie, Clinton and Red Jacket claims, and threw pay ore away over the dump, so that by his acts it was lost to the owners of said claims. Under this specification of error defendants state that the following testimony was given at the hearing:



E. T. POWERS testified that after the tunnel through the Contact, Atlantic and part of the Annie claim had been repaired he took a contract from J. M. Douglass to extend the tunnel 500 feet. "My contract provided that the tunnel should be six feet in the clear, three and a half feet wide at the top and four feet wide at the bottom. J. M. Douglass instructed me to follow the vein and the contract called for it. I followed the vein the whole 500 feet. I found ore there, and I had a verbal contract with Douglass to save the ore, and I did save part of it, and there was a storm, and no dump to put the ore on, and I put ore in the creek. I told Douglass after we struck a big bunch of ore in the Red Jacket ground to put a dump in there and we would save the ore, but he did not do it, and so we dumped the ore in the creek, right in the channel and a flood of water washed it away. The ore was gold bearing ore principally. Douglass said, while under the influence of liquor when I told him there was ore there, to let it go to hell. I made a special trip in a buggy from Silver City to Virginia to tell Douglass about the ore and this was the reply he made to me. The ore we dumped in the creek was as good, if not better than that saved, and that saved was \$20 to \$25 rock. I think it would mill that. It would cost \$6 a ton to mill it, and from 50 cents to \$1 per ton to haul it to the mill. The vein in the Red Jacket would average 18 inches in width. I think that ore ought to mill \$35 to \$40 per ton, and we had assays made that went up into the hundreds. The whole of the vein, 7 feet by 1½ feet, was taken out, and that would make 84 tons from the Red Jacket mine. The ore taken out and thrown away was better than that immediately above the tunnel.



The Red Jacket mine is worth \$2,500 less than it was before the ore was taken out. The ore taken out and thrown over the dump in running through the Clinton ground would average ten inches in width, and some of it was worth \$60 per ton. The ore was thrown in the creek and was finally washed away.

W. S. CUMMINGS testified that he is a miner and worked 24 shifts under Powers, who had the contract from Douglass to run the tunnel on the right of way. The orders were to run the tunnel in the vein, and it was so run. There was ore taken out in running the tunnel, and dumped with the waste altogether. There was no means provided to save the ore.

It was admitted upon the hearing by counsel for all the parties to the suit, that the tunnel is 648½ feet in length to the point where petitioner began new work in extending the tunnel.

G. W. DEBUS testified that the value of the ore taken out of this tunnel in the Annie ground was worth about \$35 or \$40 per ton; that from the Red Jacket \$60 to \$90 a ton. The assays from the ore taken from the Clinton ground ran from \$130 to \$289 a ton. I took out forty tons of ore from the ledge from the top of the tunnel up. It paid us \$1254.

CHARLES POLLOCK testified that he is a miner, that he worked in extending the tunnel under Powers for J. M. Douglass about a month. The tunnel ran upon a vein of gold and silver bearing quartz. There was pay ore in the ledge. I worked in the Clinton ground. The ore taken

out was thrown away. The ore and waste was all broken down together and thrown away.

GEORGE ROACH testified that he had worked about a month under Powers in running the tunnel. The ledge was taken out and dumped with the waste. It was pay ore.

ALBERT S. PURDY testified that he was in the tunnel when it was being run through the Clinton claim. Ore was taken out in running the tunnel on the right of way and dumped in the creek. Ore was taken out of the same vein by the owners above the tunnel from the Red Jacket, Annie and Clinton claims. There was 63 tons of \$22.50 rock and 40 tons of \$31.25, and the \$60 rock in free gold was 13 tons. We began right at the tunnel in the Clinton ground. All that ore and all of the rock taken in running the tunnel was all dumped together as waste.

On the part of plaintiff, W. H. NAILEIGH testified that he had no instructions to dump ore and waste together in the bottom of the creek. That no instructions were given to save ore, and did not do it. The ledge in the tunnel run from five to six and seven inches in width, and there is a seam of pay ore running through the vein. I measured it at different points in the Red Jacket and measured the largest place in the Clinton ground on the side of the tunnel, and it was about one foot wide, and these were places where there was only a little ribbon of quartz and stringers that ran through the vein formation. The width of the ore to save and mill in the Clinton ran from two to five and six inches, and then it would pinch

down to nothing that could be saved, and then it would widen out again. It was not continuous wide enough to save the entire distance, but could be saved in places. From the South End claim the ore started in the Clinton and run a distance of 40 or 90 feet, where the ore went along. There is not a solid, continuous ore body followed by the tunnel. From the place where I commenced to work taking all the ore that could be saved at a profit where it was wide enough, I would say it would average 4 inches in all. I took out ore immediately above and below the tunnel that paid \$30 a ton. I took ore from the Clinton claim immediately above the tunnel that paid \$90 per ton. No human being can tell the value of the ore taken out by the tunnel excavation in those claims, by reason of the fact that the ore was taken out and carried out by the workmen with the waste, and all dumped together in the creek. I do not consider that there was any ore taken out of the Annie claim and thrown away which would pay a dollar a day to save it. I would run a tunnel similar to the one that was already run through similar ground 648½ feet at \$7 per foot through the hard blasting ground, and the balance after vein matter was struck for \$4 per foot.

J. D. BLACKBURN, F. S. LACROUTS, J. F. ANGELL and E. D. BOYLE each testified on the part of the plaintiff that he had examined the vein in the tunnel run through the Annie, Red Jacket and Clinton claims, after the tunnel had been run through those claims, for the purpose of determining whether the vein contained ore of sufficient value or in sufficient quantity to pay to mine it, and testified that in his opinion the ore would not pay to extract.

W. H. NAILEIGH, a witness called on the part of petitioner, having been first duly sworn, testified as follows:

My occupation is mining, and have been engaged at various kinds of mining since 1854 and 1855. I have mined in Silver City since 1861, and I am familiar with the ore deposits and ledges in that district. I know the Contact-Goodman tunnel. It commences on the Contact ground and runs through different claims to the Goodman mine. The old tunnel had been excavated some distance beyond the Contact ground. I went with Andrew Charles in the tunnel and climbed in over some caves, but at the time I went to work in the tunnel it had been cleaned and repaired and the track was laid to the Annie ground, and when I commenced work extending the tunnel it was already in the Annie ground. I started the work of extending the tunnel with John C. Charles under a contract with Mr. Douglass. E. T. Powers got the contract and Andrew Charles and his son John Charles and myself were interested in it. We all shared the money for the first 117 feet run.

In running through the Annie ground we followed the the vein according to the contract and took out vein matter and quartz; there was a seam of quartz on the hanging wall and Mr. Charles said it required to be saved, and we got out about half a carload of rock and dumped it on the dump. Charles and Douglass were partners, and he said Douglass wanted his saved and we saved it. Then the seam pinched so we couldn't save it and we didn't save any more until we got to the Red Jacket where the vein got wider, and where it could be saved; the ore showed black sulphurets there, and Mr. Charles said he would like to

have that saved; he said Douglass wanted it saved. I did not horn any, but I examined it with the eye, and we concluded to save the ore from that point, and we allowed John Charles to gouge in the streak as far in as he could and take it out and dump it on the dump. We worked that way until the ore pinched and got mixed again, and until Charles thought it would not pay to save any longer, and we didn't save any more. In the Clinton ground we followed the vein of quartz and clay all the way; in some places it would be mixed up with little ribbons of quartz and other times there was two or three inches of quartz, and we did not undertake to save any of it there. We had a contract to run the tunnel at so much a foot, and it took a little extra time to save the rock, and Powers went and saw Douglass, and they had some kind of agreement or understanding. Powers told me and the others when he came back that Douglass had agreed to pay monthly, or save fifty per cent, if necessary, and if any ore did come in he was to save the ore. At any rate we got no more orders to save any ore from Charles. At that time Charles was Douglass' agent, and he received the work and made the measurements, and we done what he said about saving the ore, and all that. Whenever he thought the ore was in sufficient quantity to save he told us to save it; where it was too small it took too much time. I understood Charles was an owner in the Annie, and he took charge of the ore we got there, but we got very little there. The ore from the Red Jacket was dumped at the mouth of the tunnel on the side of the track, and most of it is there yet. We did not receive any orders from either Douglass or Charles to dump the ore and the waste together in the bottom of the creek. When we had no instructions to save



the ore we did not save it. Charles was there and his son was there, and his son seemed to represent him, as he would tell us "father said so and so," and he would say "this ore is not worth saving," and finally there was no ore to save. Of course, it was not to our advantage to save the ore, and we did not save it only when we were told to save it.

The ledge through the tunnel is vein matter from five to six and seven feet in width, and there is a seam of pay ore running through the vein. I measured it at different points in the Red Jacket, and measured the largest place in the Clinton ground on the side of the tunnel and it was about one foot wide, and there was places where there was only a little ribbon of quartz and stringers that run through the vein formation. In the Clinton the ore seemed to run from two to four or five inches, and there was quartz on either side of that pay seam that was mixed with Clay, but the width of ore to save and mill in the Clinton run from two to five and six inches, and maybe in some places it would be as wide as eight inches, and then it would pinch down to nothing that could be saved. It was not continuous wide enough to save, but could be saved in places, probably. In places it was wide enough to save if it was rich enough. From the South End ground the ore started in the Clinton and might probably have run a distance of 70 or 90 feet where the ore went along, and it extended perhaps 15 or 20 feet where we sunk an incline and began stoping out after the tunnel was constructed, and it may be 20 feet on the other side where the ore is so broken that we could not save it to profit, and from there to the Goodman there was nothing worth saving. There is no continuous body of ore that can be saved in the tunnel.



To take all the ore in the tunnel that could be saved and these little stringers and all together, it would be impossible to estimate it, but taking all that could be saved at a profit where it is wide enough, I would say it would average four inches in width all the way from the Red Jacket where we started to raise on through to 25 feet beyond the point where we started to raise up in the Clinton ground in the east raise.

The dip of the ledge is across the tunnel at different angles; sometimes it is nearly flat, but I will say at an angle of from 40 to 50 degrees at different places, and the ore dipped so that in places there would be five feet of ore on the strike of the ledge taken out by the excavation, and the ore in places would be left in the footwall at some distance up, and afterwards part of it was taken out by myself and others after the tunnel was excavated, so that there had been seven feet up and down of ore taken from the tunnel, because it had been left on one side. Taking the entire length of the tunnel there was no such a thing as eight feet of a ledge taken by the tunnel at any one point.

It is not reasonable, or even plausible to estimate the number of tons of ore taken out by the tunnel excavation in the Annie ground by multiplying 36 feet in length by eight feet high and 12 inches thick and dividing the result by 13. The ore is not continuous. Such a rule would not be proper, reasonable or even plausible to apply to the Red Jacket. The ore is not continuous there either and there is not that height of ore taken by the excavation. There was not an average width of a foot of ore in the mines traversed by the tunnel. It would not be a fair way to calculate the amount of ore taken out of the Clinton.

I went in the tunnel prior to any work being done to extend it. It had fallen in places and was filled up from the sides and top. It could not be used for prospecting or mining purposes without first cleaning and repairing it. Where I worked I would prefer to run a new tunnel than to fix up the old. It took me more time to clean it than it would to run a new tunnel. Charley Bowman and me made 45 cents a day repairing that old tunnel. Running the new tunnel at \$4 a foot we made as high as \$4 and sometimes as high as \$8 a day. We made 45 cents a day for a while repairing the old tunnel, and then Douglass gave us a little better lay out, and we cleaned it fifteen feet more for \$2.50 a day, and didn't complete it, and then he contracted with Mullaly for \$2 a day.

From the mouth of the tunnel on the Contact ground to the Annie, I would like to get a contract to run a new tunnel for \$5 a foot. The first ground through the Contact is hard blocky ground and when it was run when they were using black powder it may have cost \$12 a foot, but now it does not cost so much.

Take a tunnel  $7\frac{1}{2}$  feet square from the Annie ground to the Goodman, and I don't think it has any value without the ore. Unless it interfered with some one working I would not put any value upon it at all.

Before the tunnel was constructed, I would not place any value on the Annie mine.

Before the tunnel was constructed the Red Jacket had no certain value and it was purely speculative.

Prior to the construction of the tunnel the Clinton had no value.

I think the construction of the tunnel has been beneficial

on the value of the mines through which it runs, because the mines showed nothing on the surface compared to what they show in the tunnel, and the Annie and Clinton were open to location prior to the running of the tunnel. I consider that the running of the tunnel has opened those mines, and that they are more valuable to-day from the work done. The defendants have taken out ore since the construction of the tunnel, which they could not have taken without the running of the tunnel, without they ran a tunnel or sunk a shaft themselves.

I would not consider it of any value to run the tunnel through any of the properties. I would not go to work to construct a tunnel as Douglass did and take all the ore for the right of way itself, and where there is no ore I can't say there is any value upon it at all.

#### *Cross-Examination.*

Under cross-examination by Mr. Deal, Mr. Naileigh testified as follows:

I took the contract to run the tunnel at \$4 a foot. The terms was that we was to follow the vein, and we knew the vein matter would break easier. We followed the vein all the way. I wanted to make as may feet per day as possible; the more feet I made the more money I made, and we worked the best way we could to make the most money; we knocked down as much rock at a blast as we could. We worked as best we could to make money. We paid more attention to the running of as many feet of tunnel per day as we could than to the value of the ore that was being taken out. Looking at the ledge to see how much the ore was worth was a secondary consideration. I

could not tell whether the ore taken out was worth \$10 a ton or \$100, except in the Red Jacket, where it was free milling ore. I could not horn the other ore. I took no assays. I don't think a man could make a dollar a day trying to save the ore taken out of the Annie.

The ore that I took out of the Red Jacket paid \$30 a ton; I think the ore I took out of the Clinton paid \$90 a ton. No person to-day can tell the value of the ore taken out of the claims by the tunnel excavation by reason of the fact that the ore was taken out and carried by the workmen with the waste and all dumped together in the creek. If there was any ore of value taken from the Annie, the mine is worth so much less. I don't consider there was anything in the Annie that would pay a dollar a day to save. The Red Jacket is worth to-day less the value of the ore taken out of it, and the same with the Clinton.

There was 648½ feet of tunnel already run and 250 feet of it was through hard blasting ground in the first part of the tunnel. Through that 250 feet of the tunnel I would take \$7 a foot to run it, and furnish everything. After striking the vein matter I would take a contract to run it for \$4 a foot. For repairing the tunnel he paid us 90 cents a foot at first and then \$2.50 a foot and Mullaly finished it for \$2 a foot; we made 45 cents a day at it. I understood the first 250 feet was let for 40 cents a foot. He paid Powers and us \$185 for retimbering, and I don't know what the material cost. The cost for the other part may have been \$550 for labor and material. I don't know whether the material could have cost \$200 or \$400; there is two lines of pipe and I don't know what they cost; it might exceed \$400. He paid us ten cents a foot to put the pipe in.

Indirectly I made a location of a placer claim in the American Flat ravine some little distance below where the rock was thrown out of the tunnel in order to save the the rock washed down from the tunnel; there had been two or three old tunnels run, and we believed if there was a heavy flood that it would wash the rock down. This location was made since this stuff was taken out of this tunnel. One of the reasons why I made the location was the fact that pay ore was taken out of the tunnel.

I took assays from the Clinton that went as high as \$170 a ton. I did not take them while running the tunnel—but after the tunnel was run. They were taken from the sides and top of the tunnel. We took an assay from a streak under the pay in the Clinton that went \$4 a ton.

I remember when Biggs paid us and the rest of the men in Cummings' house in Silver City. I never made any such statements there as "if you get what you are entitled to for taking this ore, you you will get a sack," speaking of what Douglass should pay for the right of way. I never said "if you get what you are entitled to, you will get a sack, because there was thousands of dollars' worth dumped in the creek." I might have said there was a thousand dollars' worth of ore dumped in the creek. I remember when we were trying this case in the circuit court in Carson that I said in the presence of Mr. Deal that Douglass had taken out large quantities of valuable ore from those mines and thrown it in the creek.

#### *Redirect Examination.*

If there is so much ore taken out from a place there is so much less to mine when you go to mine it, and a mine would be worth that much less, I suppose, except the cost



of milling and other costs. I would consider that the tunnel being in there and developing the mine to that extent would be a benefit to the mine owner regardless of the ore taken out.

I never worked the placer mine I located, and never considered it would pay me to work it. There might have been a thousand dollars' worth of ore thrown in the creek and a man sluicing might get \$500 of it.

I would not place any value on the ore taken out by that tunnel. The ore taken from the Red Jacket was the best, and that was taken out and saved until the ledge broke up in stringers and we were told it was no longer worth while to save. I would not run the tunnel for the ore in it. I have had assays made from ore taken from the tunnel since. I took as fair average samples from the top, bottom and sides of the tunnel as I could get. I don't think the ore in all the mines taken out by the tunnel would go six dollars a ton. I mean taking waste and all. But taking the size of the streak that would pay to work, I should take the ore that came out of the Red Jacket part of the tunnel to be worth \$30 a ton. That would run from 20 inches down to one and a half inches in width, and five feet high. The ore in the Clinton carefully taken out ought to be worth \$60 a ton. It runs in width from almost nothing to two inches and up to 12 inches at the biggest point. I would say in the Clinton it would average 4 inches wide for a distance of 80 feet, and run from four to five feet high, 80 or 90 feet in length.

MR. NAIGHLEIGH was subsequently recalled and testified as follows :

After the construction of the tunnel I had charge of



work taking out ore from the Red Jacket and Clinton mines for Mr. Biggs. I took out 13 tons of ore from the Clinton. We started on the side of the tunnel and stoped down seven feet and stoped along for 12 or 14 feet, and we took some ore on the other side almost at the extreme end where the ore showed; the ledge in the roof assayed \$4 a ton, but we thought we could do better, and didn't take that from above.

I think there was some 14 or 18 tons of ore taken out of the Red Jacket and saved. I would say there was 15 tons of ore there now which was saved from the Red Jacket while running the tunnel. Taking all the ore taken out from the Red Jacket and the Clinton and I don't think there was over \$1000 or \$1500 worth thrown in the creek that could have been saved.

I am satisfied that the ledge shown in the tunnel is the same ledge shown on the surface of the Red Jacket.

All the ore that was dumped in the creek from all the mines by the excavation of the tunnel from the Annie to the Goodman which might have been saved, I estimate might be worth from \$1000 to \$1500. I count all the ore that could have been saved by close working.

MR. NAILEIGH testified before the second commissioners as follows, after being first duly sworn:

I saw the old tunnel before it was cleaned out and repaired. Before I started work there the tunnel had been cleaned out to a certain point and timbers put in, and the ground had got in such condition that the parties working there couldn't handle it, and their timbers were pressed in and broke down, and we took a contract to go in the tunnel and clean it out. Our first work was to drive spil-

ing where the timbers came together, and the timbers had decayed and we had to cut our way through the old ground and drive spiling in to keep the roof up and lag it and breastboard it. There was great mounds in the tunnel where there was caves, and we crawled over mounds that were higher than the original roof of the tunnel. It was no use for any purpose either for drainage or mining before it was cleaned out. We began extending the tunnel at the point where the old tunnel terminated and extended it 502 feet. We began at about point "9" by this map between the sixth and seventh stations, on the Annie ground. All the ore we could get out of the Annie mine was about half a carload.

*Cross-Examination by Mr. Deal.*

The ledge followed by the tunnel I drove for Douglass shows in the upper tunnel and in the Annie and Clinton ground. We suppose it is the same ledge; we made an upraise in the Red Jacket and followed the ledge all the way, from the tunnel level to the upper tunnel, and we made an air connection right through in the Red Jacket ledge. I think it is all the same formation in the Clinton, and the same ledge.

I would run a tunnel alongside of that tunnel for the first 300 feet at \$4 a foot, but I would not want to take it for 1000 feet at the same price. I think we got a dollar and a half a foot for repairing the old tunnel and retimbering it.

Ore has been taken in the Clinton claim immediately adjoining the tunnel that milled \$60 a ton, and the concentrates paid \$30 a ton in addition.

Ore has been taken right below and right above the tunnel itself in the Red Jacket that paid in the mill \$30 a ton.

I consider ore that pays \$12 a ton, or is worth \$12 a ton, pay ore. In the Clinton the assay above the tunnel went \$4 a ton and below the tunnel it went \$90 a ton.

The only way the value of the ore taken out by the tunnel excavation could have been ascertained would have been to have saved it by taking it out separately.

When I say pay ore I mean such ore as will yield a profit above cost of mining and milling.

R. C. HUNT, called upon the part of the petitioner, testified as follows, after being duly sworn:

I have resided at Silver City for 23 years, and I am a carpenter by trade and follow mining. I know the Devil's Gate and Chinatown Mining District. I have worked in the tunnel in controversy in the Clinton claim. Mr. Naighleigh had the contract and he hired me. He put me to work and showed me where to work, and told me to pick around and get the best I could find, and I done so. There was a ledge there for about twelve feet that would average about five inches of pay. The streak was small and we gouged it out; we worked underneath and took out the waste, and we spread sacks or canvas under and gouged the ore out, and put it in a car and if there was any waste in it we had a chance to take it out and leave the pure pay; it was by this method that we obtained rock that assayed so high.

I have looked through the tunnel; there is no continuous vein of pay rock from the Annie to the Goodman. There is no way by which I could determine the pay rock

in any portion of that ledge by taking a certain distance and multiplying that distance by any width and height, and dividing the product by 13 to ascertain the amount of rock taken out that would pay, because it is not continuous. You might take out parts of it that would pay here and there. Where I sunk I think there was enough good rock to carry out the poor rock and make it pay, and the extent of that was about 12 feet, and there was a good streak left at the bottom. The vein in the tunnel is what is called a spotted vein, and there are places where the ledge is barren.

From my observation I don't think there could have been over ten or fifteen carloads of pay rock that might have been taken out by the entire excavation.

The running of that tunnel was a benefit to the different claims through which it runs.

I would not fix any value for  $7\frac{1}{2}$  feet square of ground through the Annie, or the Clinton or the Red Jacket for the right of way of the tunnel; I don't think it is of any value.

Multiplying the length, width and height of a bunchy and spotted ledge would give the number of tons of rock by dividing the result by 13, but such a rule of cubical measurement would not give the number of tons of pay ore. The only way they could measure the number of tons of pay ore in such a ledge would be to knock down the ore and put it in a car and measure it in that way.

*Cross-Examination by Mr. Deal.*

I don't know whether one thousand dollars' worth of ore was taken out by that tunnel or one million dollars. I have no knowledge of it; I have only an opinion. I have heard that four men took out \$30,000 worth of ore from

the Oest mine, which is near these claims. I have worked in the Oest mine; it is not such a pockety mine as the others around there.

We took ore out of the tunnel in question in the Clinton, by digging right in the bottom of the tunnel, and we took out thirteen tons in about forty shifts; we did not take the thirteen tons all from the same place; there was about nine tons taken out in that place. In the tunnel itself the chances is there was spots of as good ore as we took out. But where we dug the ore was better than it was at the top of the tunnel, and the chances are that between it did not average as good as what we took out. If the ore is good on top of the tunnel and good at the bottom the chances is it was good all the way between, but if you find it poor on top and poor on the bottom the chances is it was poor between; the only way I can judge of the value of the ore taken out by the tunnel is by looking at the ore that is left on the top of the tunnel and at the bottom; I think it is a good sign of what was taken out between.

We took out an excavation from the bottom of the tunnel six feet deep, twelve feet long and five inches wide, and it paid \$60 a ton.

In the Clinton you could not tell the value of the ore except by having it assayed; there was too much iron in it.

If the men who run the tunnel took no hornings or assays, I don't see how they could tell the value of the rock they took out.

#### *Redirect Examination.*

If that had been a solid and continuous body of pay ore it would show itself in the top, bottom and sides of the tunnel; we worked where it showed good at the bottom and



poor at the top and it is not likely it petered out just at the top.

The following is a copy of the final decree in said circuit court in this suit in equity.

In the Circuit Court of the United States, Ninth Circuit, and District of Nevada. J. M. Douglass, et al., Petitioners, v. James D. Byrnes, et al., Defendants. No. 574.

This proceeding was regularly brought on for hearing on the 26th day of September, 1893, before the Court sitting without a jury, a jury trial having been expressly waived by the respective parties in open court. F. M. Huffaker and J. L. Wines appeared as counsel for said petitioners, and W. E. F. Deal and E. L. Campbell for said defendants, to show cause why the prayer of the petitioner herein should not be granted, and the several parts of the mining claims as described in said petition appropriated to the use of said petitioners as prayed for, and said defendants having made and filed an answer in writing to said petition denying that it is necessary or proper that the land described in said petition or any part of it, should be appropriated to the said use of the petitioners. The matter was proceeded with and the respective parties introduced their proof, oral and documentary, which being concluded, the defendants by their counsel moved that the Goodman Silver Mining Company, a corporation, be made a party petitioner herein, which was done by the Court. Whereupon the matter was by consent of the respective parties submitted to the Court for its decision and judgment, upon briefs to be thereafter filed, which was done by the respec-



tive counsel within the time designated therefor. The matter was taken under advisement by the Court, and the Court having fully considered the same and being advised in the premises, did thereafter and on the 18th day of December, 1893, in open court, render its decision and judgment to the effect that the prayer of said petition should be granted and the right of way for the tunnel as set out in said petition, through the several mentioned mining claims, appropriated to the use of said petitioner, and that commissioners should be appointed to ascertain and report the compensation to be paid therefor, as by the statute in such case made and provided is required. That thereafter, on to-wit, the 15th day of January, 1894, in open court, the plaintiffs and petitioners, naming on their part E. Strother for one of such commissioners, and W. E. F. Deal, as counsel for The Red Jacket Consolidated Mining Company, naming C. E. Mack, and the Court naming on its part R. P. Keating, the Court duly appointed said persons as the commissioners herein. That said persons thereafter qualified as such commissioners and made and filed reports herein, C. E. Mack and R. P. Keating filing a majority report, and E. Strother, a minority report. That thereafter and within the time provided by law and upon proper notice, petitioners filed their exceptions to said report, and moved to set the same aside, and grant them a new trial herein, which said exceptions and motion were regularly brought on for hearing before the Court on the 18th day of June, 1894, and were argued by respective counsel and submitted to the Court for its decision and judgment thereon, and the same was by the Court taken under advisement, and the Court having fully considered

the same and being sufficiently advised in the premises, did on the 9th day of July, 1894, in open court, render its decision and judgment, sustaining the exceptions of petitioners to said report, on the ground of irregularity on the part of commissioner C. E. Mack, that prevented petitioners from having a fair trial, and ordered that said reports be set aside and said commissioners be discharged and the matter submitted to other commissioners, and the matter by consent of respective parties was continued for the suggesting and appointment of such commissioners. That thereafter and on, to-wit, the 6th day of August, 1894, this matter was again brought on for the appointment of commissioners, F. M. Huffaker appearing as counsel for petitioners, and W. E. F. Deal for The Red Jacket Consolidated Mining Co., whereupon several names were suggested by counsel for petitioners from which to select a commissioner, and H. M. Clemmons was named for a commissioner by W. E. F. Deal, Esq., and the Court continued the matter for one week to consider the appointment of commissioners, and accordingly on the 13th day of August, 1894, the Court appointed as such commissioners, Joseph R. Ryan, of those named by petitioners, H. M. Clemmons, named by said counsel for said defendants, and H. M. Gorham, named by the Court, and fixed their first meeting at the city of Virginia, for August 21, 1894, at which time said commissioners met, duly qualified and proceeded with the matter for which they were appointed, and thereafter made and filed their report herein on the 3rd day of September, 1894, the same being the day designated by the Court in its order appointing said commissioners.

That thereafter, and on, to-wit, the 22nd day of Septem-

ber, 1894, W. E. F. Deal, on behalf of said defendants, filed exceptions to said report and gave notice that on the 2nd day of October, 1894, said counsel would move said Court to set aside said report on the grounds specified in said exceptions, or as soon thereafter as the matter could be heard by the Court; whereupon counsel for petitioners moved the Court to strike said exceptions from the files on the ground that the same were not filed and noticed within the time specified by law for filing such exceptions, and thereafter by consent of respective counsel the Court ordered that said matters be set for hearing on Wednesday, the 12th day of December, 1894, on which day said matters were regularly brought on for hearing before the Court, W. E. F. Deal, Esq., appearing as counsel for the defendants, and F. M. Huffaker and J. L. Wines for petitioners; whereupon after argument by counsel the Court took said matters under advisement, and thereafter, and on this 18th day of March, 1895, the Court being fully advised in the premises, delivered its decision and judgment in open court and finds that the evidence sustains the said report of the commissioners, and that the same should be approved.

Wherefore, it is ordered, adjudged and decreed that the said exceptions thereto be and the same are hereby overruled, and defendants motion for a new trial denied, and said report be and the same is hereby allowed, approved and confirmed. It is further ordered that petitioners pay the costs of this proceeding. That commissioners E. Strother, R. P. Keating, C. E. Mack, H. M. Clemmons, Jos. R. Ryan and H. M. Gorham, be and they are hereby allowed the sum of one hundred dollars for services; also that C. E. Mack be paid \$31 expenses; and Peterson & Sam-

uels \$8 for team, and \$101 to Alf. Chartz, for fees as reporter for second commissioners.

Done in open court March 18, 1895.

HAWLEY,  
Judge.

Wherefore, defendants pray that this, their bill of exceptions and statement on appeal, may be allowed and settled, and that they be allowed an appeal from said final decree and from the order of the court denying their motion for a new trial, to the United States Circuit Court of Appeals, for the Ninth Circuit.

Dated June 7, 1895.

W. E. F. DEAL,  
Solicitor for Defendants, except South End Mining Co.

The above and foregoing bill of exceptions was presented to me for settlement on June 8, 1895, and I hereby certify that I settled the same and allowed the same, and that the same is correct.

HAWLEY,  
Judge.

Dated January 11, 1896.

[Endorsed]: No. 574. U. S. Cir. Court, Dist. of Nevada. J. M. Douglass, et al., v. J. D. Byrnes, et al. Bill of Exceptions and Statement on Appeal. Filed June 8, 1895. T. J. Edwards, clerk.



Order allowing appeal, etc., as entered on the minutes,  
Jan'y 13, 1896.

JOSEPH M. DOUGLASS and THE	}
GOODMAN MINING CO.,	
	Plaintiffs,
vs.	
JAMES D. BYRNES, ET AL.,	}

### **Order Allowing Appeal.**

James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs and The Red Jacket Consolidated Mining Company, defendants in the above-entitled cause, having moved the Court on the 5th day of August, 1895, for an appeal to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree entered in this cause and from the order of the Court denying them a new trial herein, it is now ordered that said appeal be and the same is hereby allowed as of said 5th day of August, 1895.

It is further ordered, that said defendants have 20 days from this date to file a bond on appeal, as required by the former order of this court, and for the issuance and service of a citation herein.



Order fixing bond, of date August 5, 1895.

DOUGLASS, ET AL., )  
 vs. )  
BYRNES, ET AL. )

### Order Fixing Amount of Bond, etc.

On this day came Mr. Deal, solicitor for defendants, and moved the Court for an order allowing an appeal herein, which motion was taken under advisement. It is further ordered that the bond on appeal herein be and the same is hereby fixed at one thousand dollars; and that defendants have until the 12th instant to file their notice declining to accept the plaintiffs' proposed amendments to their bill of exceptions, or statement on appeal.

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*In the Circuit Court of the United States for the Ninth Circuit  
 and District of Nevada.*

J. M. DOUGLASS and THE GOOD-  
 MAN GOLD AND SILVER MINING  
 COMPANY, a Corporation, )  
 Petitioners, )  
 vs. )  
 JAMES D. BYRNES, ET AL., )  
 Defendants. )

### Opinion.

Petition to condemn the right of way for a tunnel through certain mining ground.

F. M. Huffaker, and Baker, Wines & Dorsey, Attorneys for Petitioners.

E. L. Campbell and W. F. Deal, Attorneys for Defendants.

HAWLEY, District Judge. (Orally.)

The Goodman Gold and Silver Mining Company, a corporation organized and existing under the laws of the the State of Nevada" (Gen. Stat. Nev. 256-273), to condemn mining ground situate in the Devil's Gate and Chinatown Mining District, known as the Goodman mine.

J. M. Douglass is the owner and holder of a controlling interest of the capital stock of said corporation, and now is, and for two years last past, has been engaged in working the Goodman mine for his own benefit, in his own individual interest, at his sole expense and outlay, with the knowledge and consent of said corporation. Having such ownership and interest in the Goodman mine they claim the right, under the provisions of the "Act to encourage the mining, milling, smelting or other reduction of ores in the State of Nevada" (Gen. Stat. Nev. 256-273), to condemn the right of way for a tunnel seven and one-half feet wide by seven and one-half feet high from the Contact mine through five intervening mining claims and locations, viz. The Atlantic, Annie, Red Jacket, South End, and Clinton, to the Goodman mine, and to appropriate so much of each of said intervening mining claims as is and will be necessary for the proper construction and maintenance of said tunnel.

The evidence shows that several years ago a tunnel was run through the Contact mine into the Atlantic ground; that a portion of this tunnel, by lapse of time and now

use, had become out of repair; that petitioner Douglass claims to be the owner of the one-half of the Contact mine; that the defendants, Byrnes and Mulville, claim to be the owners of the tunnel from its mouth on the Contact mine into the Atlantic mine and they claim that any interest which Douglass may have in the Contact mine is held in trust for them and is subject to their rights to work the Atlantic through the tunnel; that in February, 1892, petitioner Douglass located a tunnel right, under the act of congress, commencing at the mouth of the old tunnel on the Contact mine and running through the intervening mining claims before mentioned to the Goodman mine; that he cleaned out the old tunnel running into the Atlantic ground and repaired it and has constructed a tunnel the balance of the way through the other claims to the line of the Goodman mine; that the defendants, Byrnes and Mulville, claiming to be the owners of the Atlantic ground and the old tunnel, commenced an action in ejectment to recover the possession of the tunnel; that thereafter this proceeding was instituted in the State district court, by Douglass, and subsequently removed to this court, and the Goodman Mining Company was, upon motion of defendants, made a party petitioner herein; that a feasible, economical, direct and convenient way of running the tunnel is on the line which Douglass selected; that a tunnel could have been constructed a few feet higher, or lower, or a few feet on either side thereof so as not to interfere with the old tunnel, without much more inconvenience or expense, but no place could have been selected without the necessity of running through the ground of various mining claims before reaching the Goodman mine; that the Atlantic, Red Jacket and South End

are patented mining claims, and the Annie and Clinton are not patented.

Section 1 of the act of the legislature of the State of Nevada, reads as follows: "The production and reduction of ores are of vital necessity to the people of this State; are pursuits in which all are interested, and from which all derive a benefit; so the mining, milling, smelting, or other reduction of ores are hereby declared to be for the public use, and the right of eminent domain may be exercised therefor."

Section 2 provides, among other things, that: "Any person, company, or corporation engaged in mining, milling, smelting, or other reduction of ores may acquire any real estate, or any right, title, interest, estate, or claim therein or thereto necessary for the purposes of any such business, by means of the special proceedings prescribed in this act."

Section 6 provides that: "Upon the hearing of the allegations and proofs of the said parties, if the said court or judge shall be satisfied that the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition, then such Court or judge shall appoint three competent and disinterested persons as commissioners."

Other sections of the act provide how the proceedings shall be commenced, what shall be set forth in the petition, who shall be made defendants, how the commissioners shall be selected, the manner in which they shall proceed, etc.

The question whether the defendants, Byrnes and Mulville, are the owners of the tunnel right of way from its mouth of the Contact mine into the Atlantic ground need

not be determined at this stage of the proceedings. The act contemplates that the parties having any right, title or interest in the lands sought to be condemned shall make proof of their interest in the land and of its value before the commissioners. In fact this Court cannot, at the present time, determine any question of title to any of the mining claims for it may be that other parties who have not appeared and answered the petition will appear and assert some right, title or interest before the commissioners, if any are appointed. Section 3 of the act provides, that:

“The persons in occupation of said tract or tracts of land, and those having any right, title, or interest therein, whether named in the petition or not, shall be defendants thereto, and may appear and show cause against the same and may appear and be heard before the commissioners herein provided for, and in proceedings subsequent thereto, in the same manner as if they had appeared and answered said petition.”

The Court at the present time can only be called upon to determine whether “the said lands, or any part thereof, are necessary or proper for any of the purposes mentioned in said petition,” as provided in section 6, and whether the act authorizes such lands to be condemned for the purposes set forth in the petition. The constitutionality of the act and the fact that the business of mining is a “public use” in this State, is settled and determined by the decisions of the supreme court in *Dayton v. Seawell*, 11 Nev. 394, and *Overman v. Corcoran*, 15 Nev. 147; see also *Lewis on Em. Dom.* sections 1,184; *Mills on Em. Dom.* section 20. The power of the legislature having been fully recognized and sanctioned, the purpose of the act should not be hampered by any narrow or technical objections. The impor-



tance of encouraging the mining industry of this State must be kept in view. This was the object, intent and purpose of the legislature in passing the act, and its wisdom, policy and expediency was thereby determined. A reasonable, fair, just, broad and liberal view should be taken by the Court in interpreting its provisions.

Defendants claim that the petition should be denied because the evidence shows that there were other places in the vicinity as well adapted as the one selected by Mr. Douglass where the tunnel could have been run without interfering with the old tunnel on the Contact and Atlantic mining claims. The testimony upon this point is not relevant to the real issues in the case. A large discretion is necessarily invested in petitioners in the selection of the route for the tunnel. It must be presumed that self-interest if nothing else, will dictate that they would not abuse this power. It is not within the power of the Court to absolutely control the exercise of this discretion in selecting the land to be condemned. It will not be reviewed by the Court unless it appears that they have exceeded the authority of the statute and have acted in bad faith. In *Overman v. Corcoran*, there is a complete answer to the claim made by defendants upon this point. The Court in that case, in reply to a similar contention, said: "It may, for the sake of the argument, be admitted, as claimed by appellants, that respondent could have gone six hundred feet further west or six hundred feet further east and procured other land upon which to erect the necessary hoisting works and sink a shaft. The record, however, shows that all the adjacent lands are located and claimed as mining locations; hence the same objection could have been



urged wherever the location of a site was chosen, and if this fact should be considered of sufficient importance to prevent the condemnation of the lands in question, then it would follow that no lands could ever be procured by the respondent under the act of the legislature. This case would then come within the category of cases which, as was said in *Dayton G. & S. M. Co. v. Seawell*, were liable to happen, that 'individuals, by securing a title to the bar-their lands for a just and fair compensation, which capi-within their power, by unreasonably refusing to part with their lands for a just and fair compensation, which capi-tal is always willing to give without litigation, to greatly embarrass, if not entirely defeat, the business of mining in such localities,' and confirms the opinion there advanced, that 'the mineral wealth of this State ought not to be left undeveloped for the want of any quantity of land actually necessary to enable the owner or owners of mines to conduct and carry on the business of mining.' The law does not contemplate that an 'absolute necessity' should exist for the identical lands sought to be condemned. The selection of any site for the purposes specified must necessarily, to some extent, be arbitrary.

The position contended for by appellants is not sustained by any sound reasoning, and is wholly unsupported by authority."

See also *N. Y. & Harlem R. R. Co.* 46 N. Y. 553; *Boston & Albany R. R. Co.* 53 N. Y. 576; *N. Y. Central R. R. Co. v. Metropolitan Gas Co.* 63 N. Y. 326; *Mills on Em. Dom.* section 62; *Lewis on Em. Dom.* section 395.

The real question is whether the site selected by petitioners can be condemned. It will be conceded, as claimed by defendants, that no person can appropriate

any land for his own mere private use and convenience. But the petitioners are not seeking to condemn any lands solely for their own private gain or, from wilful or malicious motives, to injure or destroy the rights of other parties. The act of Douglass in taking possession of the premises and constructing the tunnel without first obtaining the consent of the owners of the mining claims through which it passes, or taking the necessary steps to condemn the right of way, to some extent, accounts for, if it does not justify, the criticism of counsel as to his conduct. But "the Courts cannot dictate the order in which the petitioner shall proceed to acquire property or rights." (Lewis on Em. Dom. section 395.)

The duty of this Court ends by determining whether the course now being pursued can be sustained. It cannot be claimed that the petitioners, by the institution of this proceeding, are attempting to wrongfully obtain possession of any of the mining claims owned by other parties, or to destroy any rights which the owners of such claims may have therein. They only ask the right to condemn an easement—a right of way, to construct and maintain a tunnel—through the mining lands owned by other persons or corporations so as to enable them to properly drain, work and develop the Goodman mine. The tunnel commences on a level with American Flat ravine and the land, upon which the mining claims are located, rises steeply from the mouth of the tunnel. The evidence shows that it is necessary to construct a tunnel through the other mining claims in order to properly drain the water from the Goodman mine. Other attempts to accomplish this purpose by the erection of expensive hoisting works and machinery have proved unavailing for that

purpose. The Goodman mine cannot be successfully worked without the aid and advantage which such a tunnel will give. There is as much of a necessity for the running of this tunnel as there was for the construction of the road to the works of the Dayton M. & M. Co. in *Dayton v. Seawell*, or for the sinking of a shaft in *Overman v. Corcoran*, and in the light of those authorities, and of the principles therein discussed and announced, it seems clear to my mind that this case comes strictly within the provisions of the statute authorizing condemnation to be made.

A tunnel properly constructed through a mining claim cannot, as a general rule, be said to seriously interfere with the rights of the owner. Ordinarily the running of such a tunnel would prove to be of great advantage and benefit to the several mining claims through which it passes and especially would this be so if proper provision could be made for the owners of such claims to have the use and occupancy thereof, in common with others, for the purpose of working their respective mines. But in any event it is difficult to see what particular objection can be urged to the running of the tunnel if proper damages are assessed for the injury that may be caused to the mining claims through which it passes. As was said by the Court in *Dayton v. Seawell*: "The property of the citizen is sufficiently guarded by the constitution, and he is protected in its enjoyment and use, except in the extreme cases of necessity where it is liable to be taken for the purpose of advancing some great and paramount interest which tends to promote the general welfare, and prosperity of the State; and when it is understood that the exercise of this power, even for uses confessedly for the public benefit,

can only be resorted to when the benefit which is to result to the public is of paramount importance compared with the individual loss or inconvenience, and then only after an ample and certain provision has been made for a just, full and adequate compensation to the citizen whose property is thus taken, none of the dangers of future legislation predicted by respondent's counsel, is at all likely to happen." But it is vigorously contended that the act does not authorize the condemnation of mining claims or mining ground and that, if mining is a public use, the land in question was, at the time this proceeding was instituted, appropriated to such public use and cannot be condemned by any other mining company, corporation or individual. The argument upon these points extended over a wider range than it is necessary for the Court to travel in deciding this case. The term "real estate" as used in the statute was evidently intended to apply to all lands, whether agricultural, timber or mineral. The language of section 2 of the act, heretofore quoted, is broad and comprehensive enough to include any interest in any lands.

The question whether the general terms of this statute will authorize the taking of property that has already been dedicated to a public use depends upon the circumstances, conditions, surroundings and necessities established by the facts of each particular case. The land in question has never been dedicated to the public use except in the sense that the business of mining is of "public utility, benefit and advantage" to the people of this State as declared in *Dayton v. Seawell*.

Upon the facts of this case, and under the provisions of the statute, it may safely be said that an easement may be



acquired *in invitum* in lands held and occupied for a public use when such easement may be enjoyed without detriment to the public or serious interference with the use to which the lands are devoted.

Mills on Em. Dom. sections 44. 45. 47; Lewis on Em. Dom. section 276; Rochester Water Commissioners, 66 N. Y. 413; N. Y. Central R. R. Co. v. Metropolitan Gas Co. *supra*; Morris and Essex R. R. Co. v. Central R. R. Co. 31 N. J. L. 213; Peoria P. & J. R. R. Co. v. Peoria & S. R. R. Co. 66 Ill. 174; N. Y. L. & W. Railway Co., 99 N. Y. 13.

This case does not come within any of the exceptions to this rule. In Mills on Eminent Domain it is said: "Land already devoted to another public use cannot be taken, under general laws, where the effect would be to extinguish a franchise. If, however, the taking would not materially injure the prior holder, the condemnation may be sustained; or if the property sought to be condemned was not in use, or absolutely necessary to the enjoyment of the franchise." Section 47.

The general principles upon this subject are summed up in Lewis on Eminent Domain, section 276, as follows: "Fourth. Whether the power exists in any given case is a question of legislative intent, to be ascertained in the first place from the terms of the statute, and in the second place by the application of the statute to the subject matter. If the language of the statute is explicit as where a particular turnpike is authorized to be taken and laid out as an ordinary highway, the courts have nothing to do but to give effect to the express language of the statute. But, if the language of the statute is not explicit, then it

is a question of *reasonable intendment*, in view of all the circumstances of the case. Authority to construct a railroad through a narrow gorge already occupied by a public way would authorize the use of the old way if the new road could not reasonably be built without it. The chief difficulty arises when authority to condemn property for any purpose is given in general terms, as is usually the case in these latter years. In such case the presumption is against the right to take property which is already devoted to public use. This presumption may be overcome by showing a reasonable necessity for the property desired as compared with its necessity and importance to the use to which it is already devoted."

After a careful examination of the evidence it appears, to my satisfaction, that the appropriation of the right of way for the tunnel through the mining claims of defendants to the Goodman mine will be of great benefit and advantage to the mining industry of Lyon county, where the claims are situated; that it is necessary to condemn the lands asked for in the petition for the protection and advancement of said interests, and that the benefits arising therefrom are of paramount importance as compared with the individual loss, damage or inconvenience to the defendants.

This conclusion brings the case within the provisions of the statute, and shows that a necessity exists for the exercise of the law of eminent domain. (Dayton v. Seawell, *supra*; Overman v. Corcoran, *supra*.)

In due time, after notice to parties, an order will be made appointing commissioners to ascertain and assess the damages.



[Endorsed]: No. 574. U. S. Cir. Court, Dist. Nevada.  
J. M. Douglass, et al., v. Jos. D. Byrnes, et al. Opinion.  
Filed Dec'r 18, 1893. T. J. Edwards, Clerk.

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*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

JOSEPH M. DOUGLASS and GOOD-  
MAN MINING COMPANY, }  
Plaintiffs, }  
vs. }  
JAMES D. BYRNES, ET AL., }  
Defendants. }

### **Bond on Appeal.**

Know All Men by These Presents, that we, James Loughran and George A. Morgan, of the county of Storey, State of Nevada, are held and firmly bound unto Joseph M. Douglass and the Goodman Mining Company, in the full sum of one thousand dollars lawful money of the United States, to be paid to the said Joseph M. Douglass and the said Goodman Mining Company, or to their administrators, assigns, or successors, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this twenty-third day of January, 1896.

Whereas, at a term of the Circuit Court of the United States, Ninth Circuit, for the District of Nevada, in a suit pending in said court between Joseph M. Douglass and

the Goodman Mining Company, and James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs, Red Jacket Consolidated Mining Company, and others, defendants, a final decree was duly rendered, confirming the report of the commissioners appointed by said circuit court in said action, and denying said defendants' motion for a new trial therein, and the said defendants having appealed the said suit and filed a copy thereof in the said circuit court, and having served and filed the citation directed to the said plaintiffs citing and admonishing them to be and appear at a term of the Circuit Court of Appeals of the United States, for the Ninth Circuit, to be holden at San Francisco, State of California, on the 17th day of February, 1896.

Now the consideration of this obligation is such that if the said James D. Byrnes, Edward Mulville, Maggie Lee McMillan, H. C. Biggs and The Red Jacket Consolidated Mining Company shall prosecute the said appeal to effect, and answer all damages and costs, if they fail to make their appeal and plea good on appeal, then the above obligation to be void, otherwise to remain in full force and virtue.

Signed, sealed and delivered this 23rd day of January, 1896.

JAMES LOUGHRAN, [Seal]

GEO. A. MORGAN, [Seal]

Witness to signature of James Loughran:

W. E. WINNIE.

Witness to signature of Geo. A. Morgan:

W. E. WINNIE.

I, Thomas P. Hawley, District Judge, presiding as Circuit Judge, hereby approve the within and foregoing bond. January 24th, 1896.

THOMAS P. HAWLEY,  
U. S. Judge.

[Endorsed]: No. 574. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Joseph M. Douglass, and Goodman Mining Company, Plaintiffs v. James D. Byrnes, et al, Defendants. Bond on Appeal. Filed Jan'y 24, 1896. T. J. Edwards, Clerk.

(Justification of sureties on foregoing bond.)

State of Nevada, }  
County of Storey. } ss.

James Loughran and George A. Morgan, whose names are subscribed as sureties to the foregoing bond, being severally duly sworn, each for himself, deposes and says that he is a resident and householder within the county of Storey, State of Nevada, and is worth the amount for which he becomes surety on said bond over and above all debts and liabilities, in unincumbered property, situate within this State, exclusive of property exempt from execution.

JAMES LOUGHRAN.  
GEO. A. MORGAN.

Subscribed and sworn to before me this 23rd day of January, 1896.

[Notarial Seal]

W. E. WINNIE,  
Notary Public, Storey County, Nevada.

*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

J. M. DOUGLASS, ET AL.,	}	No. 574.
Complainants,		
vs.		
J. D. BYRNES, ET AL.,		
Defendants.		

### Clerk's Certificate.

I, T. J. Edwards, clerk of the Circuit Court of the United States, Ninth Circuit, District of Nevada, do hereby certify that the foregoing pages, numbered from 1 to 123, inclusive, to be a full, true and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the costs for making this record amount to the sum of \$89.50, and that the same have been paid by the defendants.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said circuit court at the Clerk's office in Carson City, Nevada, this 20th day of February, A. D. 1896.

[Seal]

T. J. EDWARDS,  
Clerk U. S. Circuit Court.

*In the Circuit Court of the United States, Ninth Circuit,  
District of Nevada.*

JOSEPH M. DOUGLASS and GOOD-	}
MAN MINING COMPANY,	
Plaintiffs,	
vs.	
JAMES D. BYRNES, ET AL.,	}
Defendants.	

**Citation.**

The United States of America to Joseph M. Douglass and the Goodman Mining Company, Greeting:

Whereas, James D. Byrnes, Edward Mulville, H. C. Biggs, Maggie Lee McMillan and The Red Jacket Consolidated Mining Company, defendants in the above-entitled action, have appealed to the United States Circuit Court of Appeals, for the Ninth Circuit, from the final decree of said circuit court, confirming the Report of the Commissioners appointed in said action, and denying the said defendants a new trial therein duly made and entered against said defendants, in said Circuit Court of the United States, for the Ninth Circuit, District of Nevada, and in favor of you, the said Joseph M. Douglass, and you, the said Goodman Mining Company, and whereas the said defendants have filed the security required by law to perfect such appeal,

Now, you and each of you are cited hereby to appear before the said United States Circuit Court of Appeals, for the Ninth Circuit, at the city of San Francisco, State of Cal-

ifornia, on the 24th day of February, 1896, the same being at the February term, then and there to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the town of Carson City, in said District of Nevada, on the 24th day of January, 1896.

THOMAS P. HAWLEY,

Judge of the District Court of the United States, presiding as Judge in said Circuit Court.

Service of the foregoing citation is hereby admitted this 25th day of January, 1896.

F. M. HUFFAKER,

Solicitor for Plaintiffs.

[Endorsed]: No. 574. In the Circuit Court of the United States, Ninth Circuit, District of Nevada. Joseph M. Douglass and Goodman Mining Company, Plaintiffs vs. James D. Byrnes, et al., Defendants. Citation. Filed Jan'y 27, 1896. T. J. Edwards, Clerk.

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[Endorsed]: No. 284. In the United States Circuit Court of Appeals for the Ninth Circuit. James D. Byrnes et al., Appellants vs. J. M. Douglass, et al., Appellees. Transcript of Record. Appeal from the Circuit Court of the United States, Ninth Circuit, District of Nevada.

Filed February 24th, 1896,

F. D. MONCKTON,

Clerk.